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TESTIMONY:

COMPLAINANT'S EXHIBITS.

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Notice of Appeal.

In Chancery of New Jersey.

GEORGE F. PERRY & SONS, INC., a corp. of New Jersey, Complainant,	On Bill, &c.
vs.	Notice of Appeal.
MAX MAND, *et als*, Defendants.	

The complainant, Geo. F. Perry & Sons, Inc., a corp. of New Jersey, hereby appeals from the final decree made in the above entitled cause on the 16th day of December, 1930, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: December 23d, 1930.

HERMAN W. BRAMS,
Solicitor for and of Counsel with Complainant, Geo. F. Perry & Sons, Inc.

I conceive there is good cause for appeal in the above entitled cause.

HERMAN W. BRAMS,
Of Counsel with Complainant,
Geo. F. Perry & Sons, Inc.

Amended Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

76-486.

GEORGE F. PERRY & SONS, INC., a corporation of New Jersey, Complainant, and MAX MAND, *et als*, Defendants.	On Bill, etc. Amended Notice of Appeal.

The complainant hereby appeals from the whole and every part of the Final Decree made in this Court in the above stated cause, advised by Vice-Chancellor Maja Leon Berry on the sixteenth day of December, Nineteen Hundred and Thirty, to the Court of Errors and Appeals in the Last Resort in All Causes.

Dated: January 6th, 1931.

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel with
Complainant.

I conceive there is good cause for appeal in the above stated cause.

E. R. McGLYNN,
Of Counsel with Complainant.

Amended Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between GEORGE F. PERRY & SONS, INC., a corporation of New Jersey, Complainant-Appellant, and MAX MAND, *et als*, Defendants-Respondents.	On Appeal. Amended Petition of Appeal.

To the Honorable the Court of Errors and Appeals in the Last Resort in all Causes:

The petition of George F. Perry & Sons, Inc., a corporation, the appellant in the above stated cause, respectfully shows that your petitioner finds itself aggrieved by a Final Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the sixteenth day of December, nineteen hundred and thirty, wherein the said George F. Perry & Sons, Inc. was complainant, and the said Max Mand, et als, were defendants, in this respect, to wit:

(a) That the said Decree adjudges that the bill of complaint filed by the complainant shall be dismissed with costs;

(b) That said Final Decree adjudges that the defendant Michael Sokol is the true and rightful owner of a mortgage dated November 16th, 1928, and a bond dated November 16th, 1928, for which

the mortgage just mentioned was given to secure, to the extent and in the manner provided for in the agreement between Arthur Znaharenko and the defendant Michael Sokol dated July 20th, 1928;

(c) That the said Decree adjudges that the complainant herein, within ten days after service upon it of a copy of said decree, shall surrender and deliver up to the defendant Michael Sokol the bond and mortgage described in said decree, together with the assignment of said mortgage by Arthur Znaharenko, and that the complainant shall execute and deliver a proper instrument assigning and transferring the said mortgage;

(d) That the said Decree adjudges that the defendant Michael Sokol is subject to the provisions contained in said Decree, entitled to the interest on the mortgage aforesaid, which interest was paid into the Court of Chancery, together with all accumulations of interest thereon, and that the balance, after deducting the lawful commission of the Clerk of the Court of Chancery, together with all interest accumulated thereon, shall be paid to the defendant Michael Sokol, or his solicitor;

(e) That said Decree adjudges that the principal sum of the mortgage aforesaid held by the complainant, together with the proceeds, interest and accumulations thereof, shall be deposited with the Clerk of the Court of Chancery until the foreclosure proceedings heretofore instituted by the Lithuanian Building and Loan Association against Andrey Lapitsky and Arthur Znaharenko shall have been completed and the property in question sold under a Decree of the Court of Chancery, in said proceedings, and that the defendant Michael Sokol shall thereupon be entitled to receive the proceeds of the money deposited with the Clerk of

said Court to the extent of any deficiency resulting to the defendant Michael Sokol, in respect to the mortgage held by him covering premises 31 Union Place, Irvington, New Jersey, by reason of said foreclosure proceedings, and that any and all surplus thereafter remaining, if any, shall belong to and be paid to complainant, and that in the event of any deficiency in respect to the aforementioned mortgage, that upon payment of said deficiency to the said defendant Michael Sokol, complainant shall thereupon be subrogated to any and all rights of the defendant Michael Sokol in and to the bond and/or mortgage dated July 26th, 1928, recorded in Book C 65 of Mortgages for Essex County pages 230-232, covering premises 31 Union Place, Irvington, New Jersey.

(f) And that said Decree adjudges that the complainant shall pay to the defendant Michael Sokol his costs and shall pay to the defendant Max Mand, his costs, including a counsel fee of $100.00.

Your petitioner humbly appeals from all that part of the Final Decree which decrees as aforesaid, upon the ground that the same is erroneous for that, the Court of Chancery should have found and decreed that the complainant was the owner of the mortgage described in the bill of complaint and should have decreed a foreclosure of said mortgage, with the proceeds thereof payable to the complainant, on the grounds that

1. The consideration for the assignment to the complainant of the mortgage described in the bill of complaint, was a valuable consideration both as a question of fact and law;

2. The defendant Sokol was guilty of

laches and he was not diligent, and his conduct should have precluded him from obtaining the relief granted him by the decree.

Your petitioner therefore prays that the said Final Decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

STEIN, McGLYNN & HANNOCH,
Solicitors for and of Counsel
with Appellant.

We hereby acknowledge service of a copy of the within Amended Petition of Appeal and consent to the filing thereof out of time.

S. H. NELSON,
Solicitor for Max Mand and Sarah Mand.

GEO. H. ROSENSTEIN,
Solicitor for Michael Sokol.

Bill of Complaint.

Filed Dec. 21, 1929.

IN CHANCERY OF NEW JERSEY.

To the Honorable Edwin Robert Walker, Chancellor of the State of New Jersey:

The complainant, George F. Perry & Sons, Inc., a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. On November 16th, 1928, Max Mand, being indebted to Arthur Znaharenko, in the sum of Twenty-six Hundred ($2600.00) Dollars, executed to him a bond of that date to secure that sum, payable on November 16th, 1930, with interest at the rate of six per centum per annum, payable half yearly from the date of the bond.

2. To secure payment of the bond, said Max Mand, executed to said Arthur Znaharenko a purchase money mortgage of even date with the bond; and thereby conveyed to him, in fee, the land hereinafter described, on the express condition that such conveyance should be void if payment should be made according to the terms of the bond. Which, mortgage, having been first duly acknowledged, and the certificate of acknowledgment duly endorsed thereon was recorded in the Register's Office of Essex County, in Book W 65 of Mortgages, page 532.

3. The mortgaged premises are described as follows:

> Beginning in the northeasterly line of Garfield Place at a point distant therein 200 feet southeasterly from the intersection of said northeasterly line of Garfield Place with the

southerly line of Coolidge Road; running thence (1) along the said northeasterly line of Garfield Place South 49° 30′ East 50 feet; thence (2) North 40° 30′ East at right angles to Garfield Place 157 feet; thence (3) North 49° 30′ West parallel with Garfield Place 50 feet; thence (4) South 40° 30′ West parallel with 2nd course herein 157 feet to aforesaid northeasterly line of Garfield Place and the point and place of Beginning.

Being known and designated as lot #24 on map entitled "Map of Ball Manor, Maplewood, N. J." made by Edmund R. Halsey, S. dated September 19th, 1925 and revised October 26, 1925 and re-revised November 28, 1925 and filed in the Register's office for Essex County, on March 29, 1926.

4. Both bond and mortgage contained an agreement that if any installment of interest should remain unpaid for thirty days after the same should fall due, then the whole principal sum, with all unpaid interest, should, at the option of the mortgagee, his representatives or assigns, become immediately due.

The said Max Mand is married, and his wife's name is Sarah. Any claim or interest she may have, by way of inchoate right of dower, or otherwise, is subject to the complainant's lien.

6. By written assignment, dated February 14th, 1929, said Arthur Znaharenko, assigned said bond and mortgage to Andrey Lapitsky, which assignment was recorded in the Register's office of Eesex County, in Book 206 of Assignments of Mortgages, page 303.

7. By written assignment, dated February 19th, 1929, said Andrey Lapitsky, assigned said

bond and mortgage to Arthur Znaharenko, which assignment was recorded in the Register's office of Essex County, in Book 207 of Assignments of Mortgages, page 38.

8. By written assignment, dated April 12, 1929, said Arthur Znaharenko, assigned said bond and mortgage to Geo. F. Perry & Sons, Inc. a corporation of New Jersey, which assignment was recorded in the Register's office of Essex County, in Book 207 of Assignments of Mortgages, page 37.

9. On February 5th, 1929, the Ramig Mfg. Co. Inc. a corporation, filed a lien against the premises covered by said mortgage, in the office of the County Clerk of Essex County, in book of Mechanics Liens 25, on page 494.

10. Any interest which the said Ramig Mfg. Co. Inc. a corporation, may have in said lands is subject to the lien of complainant's mortgage.

11. On November 16th, 1929, one-half year's interest fell due on complainant's bond and mortgage, and remained unpaid for more than thirty days thereafter, and no part thereof has yet been paid. Complainant has elected that the whole principal sum with all unpaid interest shall be now due.

12. Said Max Mand has always been in possession of the mortgaged premises.

13. The whole amount of principal, with interest thereon, from May 16th, 1929, is due upon complainant's bond and mortgage.

Complainant is without adequate remedy in the courts of law, and therefore prays:

1. That Max Mand, and Sarah Mand, his wife, and the Ramig Mfg. Co. a corporation, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That an account may be taken of the amount due on complainant's mortgage.

3. That the defendants, or one of them, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day, to be appointed by this Court; and that in default of such payment, they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or

4. That a decree may be made for the sale of the mortgaged premises to raise and pay to the complainant the amount so found due on its mortgage, with interest and costs;

5. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

HERMAN W. BRAMS,
Solicitor and Counsel
with Complainant.

Answer and Counterclaim.

IN CHANCERY OF NEW JERSEY.

76-486.

Between GEO. F. PERRY & SONS, INC., a corp. of N. J., Complainant, and MAX MAND, *et als*, Defendants.	On Bill, &c. Answer and Counterclaim.

The defendants, Max Mand and Sarah Mand, his wife, by way of answer to the bill of complaint, say:

1. They admit Paragraphs 1, 2, 3, 4 and 5.

2. They have not sufficient information upon which to form a belief as to the truth of the matters set forth in Paragraphs 6, 7, 8, 9 and 10.

3. They admit Paragraph 11, except that they deny that the principal sum is due complainant.

4. They admit Paragraph 12.

5. They deny Paragraph 13.

SEPARATE DEFENSE.

1. On May 24, 1928 one Arthur Znaharenko entered into a written contract with defendant, Max Mand, by the terms of which the said Arthur Znaharenko agreed to sell to the said defendant certain lands and premises located in the Town of

Maplewood, County of Essex and State of New Jersey (mortgaged premises mentioned in bill of complaint) and to erect and construct thereon a one family frame dwelling house, in consideration for which the said defendant agreed to pay to the said Znaharenko the sum of $16,600.00, part of which was to be paid by giving a purchase money mortgage thereon to the said vendor. Said transfer and sale was to be consummated on or before August 24, 1928.

2. On or about July 20, 1928, while the said dwelling house was in the process of construction and before the said sale and transfer was consummated and before the said bond and mortgage were made, executed and delivered, the said vendor, Arthur Znaharenko, assigned, in writing, unto one Michael Sokol, the said bond and mortgage, as collateral security for certain purposes therein mentioned, which assignment was recorded in the Essex County Register' Office in Book 200 of Assignments of Mortgages on page 272.

3. On or about November 16, 1928, said vendor, Arthur Znaharenko, conveyed the said lands and premises to said defendant, Max Mand, in accordance with the terms of the aforesaid contract and the said defendant, as part of the consideration for the said sale and transfer, made, executed and delivered to the said Arthur Znaharenko his bond of $2600.00, conditioned upon payment of the said principal sum of November 16, 1930, with interest payable in semi-annual installments, and a mortgage to secure same, upon the said lands and premises. At the time of the execution of the said bond and mortgage, said defendant knew of the pre-existing assignment thereof by the said Arthur Znaharenko, to said Michael Sokol.

4. In May, 1929, when the first semi-annual installment of interest became due, said Arthur Znaharenko communicated with said defendant, Max Mand, and requested payment of the said installment of interest, not informing said defendant that he, Arthur Znaharenko, had assigned the said bond and mortgage on April 12, 1929 to complainants herein; and the said defendant, Max Mand, thereupon advised the said Arthur Znaharenko that he was informed by the aforesaid first assignee, Michael Sokol, that the said Michael Sokol held said assignment and that the said defendant was, therefore, unable to determine to whom the said installment of interest should be paid; whereupon the said Arthur Znaharenko stated that he would straighten the said matter out with the said assignee, Michael Sokol, but fraudulently concealing the fact that he had made a second assignment of the said bond and mortgage in the interim as aforesaid. Thereafter said defendant paid the said semi-annual installment of interest to the said Arthur Znaharenko, when the said defendant was informed by the said first assignee, Michael Sokol, that the said Michael Sokol and Arthur Znaharenko would straighten the said matter out between themselves and that it was satisfactory to the said Michael Sokol for the said defendant to pay the said installment of interest to the said Arthur Znaharenko. At the time of the said payment, said defendant was still unaware of the fact that the said Arthur Znaharenko had made a second assignment of the said bond and mortgage to complainant herein.

5. Thereafter the first assignee, Michael Sokol, and the second assignee, complainant herein, each demanded payment of the semi-annual installment

of interest that became due under the aforesaid bond and mortgage, on November 16, 1929, each claimant sustaining his or its claim upon the aforesaid respective assignments. Said defendant was unable to ascertain which of the said claimants was entitled to receive the said semi-annual installment of interest, each claimant having an assignment of record, and the said defendant, therefore, refrained from paying either of the said claimants for fear that he might be obliged to make double payment. Defendant was ready, willing and able on November 16, 1929 and at all time subsequent thereto, and is, at the present time ready, willing and able to pay the said semi-annual installment of interest to the proper party entitled thereto or into Court.

6. This defendant charges that it is inequitable and unconscionable for the complainant or any other party entitled to the said bond and mortgage, to accelerate payment of the principal sum of the said bond and mortgage, by virtue of the defendant's failure to pay the aforesaid semi-annual installment of interest, under the aforesaid circumstances.

7. Defendant hereby tenders himself ready to pay the said semi-annual installment of interest into Court, so that same may be paid to the proper claimant.

COUNTERCLAIM.

By way of counterclaim, this defendant, Max Mand, says:

1. Paragraphs 1 to 7 of the Separate Defense are incorporated herein and made part of this counterclaim by reference.

2. This defendant has in no wise colluded and does not in any wise collude with the complainant or the said Michael Sokol, or with either of them, respecting the aforesaid matters, and he has not been indemnified by either of the said claimants but brings this suit of his own free will and to avoid being molested or injured, touching the matters contained in this counterclaim.

This defendant is without adequate remedy at law and prays:

1. That the complainant and the said Michael Sokol, who is made a defendant in this counterclaim, answer the allegations of this counterclaim.

2. That the defendant Max Mand may be ordered to pay the said sum of $78.00 into Court.

3. That the defendant Max Mand be relieved from acceleration of the principal sum of the said mortgage, upon paying the said semi-annual installment of interest, that the complainant and the defendant, Michael Sokol be restrained from proceeding to foreclose the aforesaid mortgage or to take any procedings thereon, at law or in equity, for the collection of the principal sum thereof, by reason of the defendant's failure to pay the semi-annual installment of interest due on November 16, 1929.

4. That the defendant, upon complying with the order of this Court, be discharged from liability to complainant and the said defendant, Michael Sokol, from payment of the said interest.

5. That the defendant have his costs of these proceedings.

6. That a writ of subpoena issue commanding the defendant, Michael Sokol, to answer this counterclaim and that complainant and said defendant, Michael Sokol, abide by such decree as the Court may make in the premises.

7. That the Court adjudicate the rights of the complainant and the defendant, Michael Sokol, by reason of the aforesaid assignments, thereby setting at rest the identity of the person hereafter entitled to enforce the performance of the terms of the said bond and mortgage.

SAMUEL H. NELSON,
Solicitor for and of counsel
with defendants, Max Mand
and Sarah Mand.

Replication and Special Replication.

IN CHANCERY OF NEW JERSEY.

76-486.

Between GEO. F. PERRY & SONS, INC., a corp. of N. J., Complainant, and MAX MAND, *et als*, Defendants.	On Bill &c. Replication and Special Replication.

The complainant by way of replication to the answer of the defendants, Max Mand and Sarah Mand, says that:

It joins issue on the answer of the defendants.

As to the Separate Defense contained in the Answer it says that:

1. It admits paragraph 1 of the Separte Defense.

2. It denies paragraph 2 of the Separate Defense.

3. It denies paragraph 3 of the Separate Defense, except that it says it has not sufficient knowledge or information to form a belief regarding the allegation that the defendant knew of the preexisting assignment thereof by the said Arthur Znaharenko to said Michael Sokol.

4. It has not sufficient knowledge or information to form a belief as to paragraph 4 of the Sep-

arate Defense, and denies the fact that the defendants did not know of the assignment of the bond and mortgage to the complainant.

5. It has not sufficient knowledge or information to form a belief as to the matter contained in paragraph 5 of the Separate Defense, but admits that the complainant demanded the interest of the defendants.

6. It denies paragraph 6 of the Separate Defense.

As to the counterclaim contained in said Answer, complainant says:

1. Paragraphs 1 to 6 inclusive, of the Replication to defendants' answer are incorporated herein and made part of this Special Replication, by reference.

2. As to paragraph 2 of the counterclaim, complainant has not sufficient knowledge or information to form a belief, and therefore denies the same.

HERMAN W. BRAMS,
Solicitor of Complainant.

Statement of Defendant Michael Sokol.

IN CHANCERY OF NEW JERSEY.

Between GEO. F. PERRY & SONS, INC., a corp. of New Jersey, Complainant, and MAX MAND, *et als*, Defendants.	Statement of Defendant Michael Sokol.

Statement of the claim of the defendant, Michael Sokol, of the City of Newark, County of Essex and State of New Jersey:

1. On or about July 15th, 1928, one Arthur Znaharenko applied to the defendant for a loan of $2000 and offered to this defendant as security therefore, a second mortgage in the sum of $2000, covering premises known as 31 Union Place, Irvington, New Jersey.

2. This defendant informed the said Arthur Znaharenko that the above mentioned mortgage was wholly insufficient security for the loan and thereupon the said Arthur Znaharenko informed this defendant that he was the owner of premises known as 175 Garfield Place, Maplewood, New Jersey, upon which premises the said Arthur Znaharenko was building a one family dwelling for purchasers named Max Mand and Sarah Mand and that according to the agreement between the said Arthur Znaharenko and the purchasers, he the said Arthur Znaharenko, would receive as part of the purchase price from them, a second mortgage in a sum then undetermined but approximately

$2500. The said Arthur Znaharenko offered to this defendant, an assignment of the mortgage to be received by him from the said Max Mand and this defendant being acquainted with the financial responsibility of the said Max Mand agreed therefore to accept as collateral security for the mortgage on 31 Union Place, Irvington, New Jersey, the bond and mortgage of Max Mand covering the property at 175 Garfield Place, Maplewood, New Jersey.

3. The said Arthur Znaharenko executed the mortgage upon 31 Union Place in the sum of $2000, to this defendant which was recorded on July 26th, 1928 in Book C 65 of Mortgages, on Pages 230-232. The said Arthur Znaharenko also executed an agreement in which he agreed to assign to this defendant the mortgage to be received by him from Max Mand and Sarah Mand which agreement was recorded in the Register's Office of Essex County in Book 200 of Assignments of Mortgages on Page 272.

4. This defendant immediately informed Max Mand verbally and by letter of the transaction and the said Max Mand agreed to pay the mortgage and interest to this defendant.

5. On or about November 16th, 1928 the said Arthur Znaharenko conveyed the premises to the said Max Mand and the said Max Mand executed and delivered to Arthur Znaharenko a bond and mortgage in the sum of $2600. At the time of the conveyance and execution of the mortgage this defendant was not present and had no knowledge or information concerning the consummation of the agreement between Arthur Znaharenko and Max Mand, and, therefore, this defendant did not at the time of the consummation of the agreement re-

ceive the actual assignment hereinbefore mentioned.

6. On or about May 15th, 1929 the said Max Mand communicated with this defendant and informed this defendant that Arthur Znaharenko had been inquiring about the interest then due and this defendant informed the said Max Mand that he had no objection to the payment of the interest to Arthur Znaharenko and that this defendant would adjust the matter with the said Arthur Znaharenko. This defendant, however, told the said Max Mand that the consent to the payment of interest to Arthur Znaharenko should in nowise be construed by the said Max Mand as permission to pay any more interest or principal to anyone but this defendant.

7. About two months later this defendant was informed that the said Arthur Znaharenko had conveyed, mortgaged, and assigned, all his property to various people and had left the country and was living in Russia. About the same time this defendant was informed by the said Max Mand that Geo. F. Perry & Sons, Inc. were claiming the interest on the mortgage of 175 Garfield Place, Maplewood, New Jersey, upon a subsequent assignment by Arthur Znaharenko to the said Geo. F. Perry & Sons, Inc.

8. This defendant has never received any payment of interest or principal on the mortgage covering the premises 31 Union Place, Irvington, New Jersey, nor any payment of interest or principal on the assignment of the mortgage covering premises 175 Garfield Place, Maplewood, New Jersey.

MICHAEL SOKOL,
Solicitor *pro se.*

Order of Reference.

Filed Feb. 19th, 1930.

IN CHANCERY OF NEW JERSEY.

76-486.

Between GEO. F. PERRY & SONS, INC., a corp. of N. J., Complainant, and MAX MAND, *et als,* Defendants.	On Bill, &c. Order of Reference.

This matter being opened to the court by Herman W. Brams, solicitor of the complainant, and it appearing that Samuel H. Nelson, solicitor for the defendants, has consented hereto:

It is, on this 19th day of February, 1930, on motion of Herman W. Brams, solicitor of the complainant, ORDERED that the above entitled cause be referred to Hon. M. L. Berry, one of the Vice Chancellors of this court, to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing order.

SAMUEL H. NELSON,
Solicitor of Defendants.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between
GEORGE F. PERRY & SONS, INC.,
a corporation of New Jersey,
Complainant,

and

MAX MAND, *et als*,
Defendants.

Transcript of proceedings in the above entitled cause before the Honorable MAJA LEON BERRY, Vice Chancellor, at the Chancery Chambers, Industrial Office Building, Newark, New Jersey, on Monday, September 22, 1930, at 10 A. M.

APPEARANCES:

HERMAN W. BRAMS, ESQ., Solicitor for Complainant.

GEORGE H. ROSENSTEIN, ESQ., Solicitor for defendant Michael Sokol.

SAMUEL H. NELSON, ESQ., Solicitor for defendants Max Mand and Sarah Mand.

The Court: I understand from counsel there are no disputed facts. The facts are all dependent upon matters of record. Put on the record what you agree to.

Mr. Brams: The stipulation is that there was a mortgage executed by Max Mand to Arthur Znahrenko, which mortgage was dated the 10th day of

November, 1928, for $2600, payable within two years with interest payable semi-annually thereafter. I have a certified copy of the mortgage and the bond which I will offer in evidence.

(Marked Mortgage Exhibit C-1 and Bond, Exhibit C-2)

I also offer in evidence an instrument purporting to be an assignment of the mortgage from Arthur Znahrenko to Andry Lapitsky,dated the 14th day of February, 1929, which instrument was recorded on the 26th day of February, 1929.

(Marked Exhibit C-3)

I offer in evidence another instrument from Andry Lapitzky to Arthur Znahrenko dated the 19th day of February, 1929, and recorded the 18th of April, 1929.

(Marked Exhibit C-4)

I offer in evidence another assignment of mortgage from Arthur Znahrenko to Geo. F. Perry & Sons, Inc., dated the 12th day of April, 1929, and recorded the 18th day of April, 1929.

(Marked Exhibit C-5)

The facts further are that an instrument purporting to be an agreement to assign a mortgage, which agreement was dated the 26th day of July, 1928, the agreement being—

The Court: Will not the agreement speak for itself? Let the agreement be marked.

Mr. Brams: It is recorded on the 26th of July, 1928 in Book 200 of Assignments of Mortgages, page 272, which I now offer in evidence.

(Marked Exhibit D-1)

The further stipulation is that Arthur Znahrenko received the first instalment of interest which was due May 1929.

That when the instalment in November 1929 became due, and prior thereto, my client, Geo. F. Perry & Son, notified Mand that an instalment of interest was becoming due and it was not paid and it was not paid for thirty days after that time, and after the expiration of that thirty days we started the foreclosure of this mortgage.

The Court: Any other facts you want put on the record?

Mr. Rosenstein: Will complainant state what the consideration was for the assignment of the mortgage given to it by Znahrenko?

The Court: Is there any question about that?

Mr. Rosenstein: Our point is that it was an antecedent indebtedness, that this assignment of mortgage was given in discharge of an antecedent indebtedness.

The Court: Where and how does that become material?

Mr. Rosenstein: In this respect—

The Court: It becomes material because of your assertion that you had an equitable assignment?

Mr. Rosenstein: Yes.

The Court: If they had notice of that equitable assignment perhaps they are bound. Suppose they did not have notice?

Mr. Rosenstein: Irrespective of whether or not they had notice, the law has been settled that as between the question of priorities, where the equitable assignment was based upon a consideration flowing at the very time, that it will take precedence to the extent of that assignment over a sub-

sequent assignment of mortgage to discharge a pre-existing indebtedness.

The Court: If you think it is material let the facts be stipulated. If they are not stipulated, you can call witnesses and find out what they are.

Mr. Brams: My client supplied Arthur Znahrenko with a carload of material in the building of various houses. That debt was past due and my client said to Mr. Znahrenko, "We have not received payment of this money." Mr. Znahrenko said, "I have not got the money." "What have you got to give us in payment of it?" Mr. Znahrenko said, "I have a mortgage of $2600 and I will assign this mortgage to you in payment." That assignment and the money was credited against the account of Arthur Znahrenko.

Mr. Rosenstein: I would like to ask that it be stipulated that all of the assignments and re-assignments from the very inception down to the last one were drawn by counsel for the complainant in this suit and that counsel for the complainant in this suit drew the assignment from Znahrenko to the complainant of April 12th, 1929, which was recorded April 18th, 1929.

The Court: What difference does that make?

Mr. Rosenstein: It makes this difference, that notice to an attorney is notice to a client as to knowledge of certain facts by the attorney. It was held by the United States Court—

The Court: Don't argue the question of law now.

You say counsel for complainant drew the agreement to assign to Sokol?

Mr. Rosenstein: Drew all the assignments.

The Court: They are all on record?

Mr. Brams: I will stipulate that.

Mr. Nelson: On behalf of the defendants Max

Mand and Sarah Mand I desire to have the following statement of facts on the record:

That on November 16, 1929, the date on which the instalment of interest became due, for the failure to pay which this suit was instituted, the defendant, Max Mand, was ready, willing and able to pay said instalment of interest and has been ready, willing and able at all times since then to pay said instalment of interest, and that the failure to pay the instalment of interest was due to the conflicting claims made by the complainant in this cause and the defendant Michael Sokol.

Mr. Brams: I refuse to stipulate as to that.

The Court: All right, prove it.

Mr. Brams: Do I understand it appears in the record that throughout the transaction Mand knew of the existence of the equitable assignment or this agreement to assign the mortgage?

The Court: Mr. Nelson says he did. The only thing to prove is the proposition which you have stated in the record.

Mr. Brams: May I, just before the defense goes on, call your attention to the fact that the agreement to assign is an agreement to assign a mortgage not yet in existence, in consideration of another instrument which was executed between Znahrenko and Sokol and that this agreement to assign and this other mortgage that was to come in the future was as collateral security for the other instrument.

The Court: Is the other instrument in existence?

Mr. Brams: Yes.

The Court: Offer it in evidence.

Mr. Brams: The agreement has that stipulation.

MAX MAND, the defendant, called as a witness in his own behalf, being first duly sworn according to law on his oath testified as follows:

Direct-examination by Mr. Nelson:

Q. You are the defendant in this cause? A. Yes.

Q. On November 16, 1929, were you ready, willing and able to pay the instalment of interest which was due on that mortgage? A. Yes.

Q. Why didn't you pay it? A. Because I found Mr. Sokol has an assignment of this mortgage and he asked the interest just the same. I did not want to pay two people. I wanted to pay one and I was ready to pay one, but I could not pay two people. I wanted to pay one, that is why I did not pay. I did not know who to pay. I knew from the beginning, a few months, ago he has an assignment. Perry wrote me a letter that he has a mortgage, but I did not know who to pay.

The Court: Did you reply to Perry's demand for interest? Did you make any reply to their demand for interest?

Witness: My son showed me the letter because he takes care of my things. He showed me the letter that Perry has a mortgage. He said that Sokol has an assignment of that mortgage and I could not pay both of them. I would like to pay one.

The Court: Did you say anything to Perry about it?

Witness: I did not see him.

The Court: Did your son to your knowledge say anything to him about it?

Witness: Not that I know.

Max Mand—Cross.

Cross-examination by Mr. Rosenstein:

Q. Mr. Mand, where was title closed for the property in Maplewood? A. In November.

Q. In whose office? A. In Mr. Nelson's office.

Q. Was the purchase money mortgage to Znahrenko executed on the same day when you closed title? A. Yes.

Q. Who was present at that time? A. My son takes care of my things and his lawyer; Znahrenko was there, and his contractor was there.

Q. When you say his lawyer, who do you mean?

The Court: What are you trying to prove?

Mr. Rosenstein: I want to prove who was present at the closing. Counsel for complainant was present at the time.

The Court: The execution of the various papers is admitted.

Q. You say Mr. Brams was there? A. Yes.

Q. You say you did not want to pay this money because two people were claiming it? A. Yes, I did not know who to pay.

Q. Did you receive notice of this fact, that there were two people claiming this money? A. My son got a letter and he told me that Perry claims that he has a mortgage.

Q. When was that letter dated, when did you receive it? A. You will have to find out through my son, who would remember it.

Q. Was it before the interest became due? A. I don't remember, you will have to ask my son.

Q. At the time the interest became due you know that there were two people claiming it? A. Yes, before.

Q. So that this letter that you received was received prior to the time interest became due, is that right? A. Yes.

Q. Then you waited thirty days after the interest became due— A. Because I did not know who to pay. I am ready to pay.

Q. Why didn't you go to your lawyer when you received notice that there were two people claiming this interest? A. I received a letter of the assignment and I had the moneys ready to pay but I did not know who to.

Q. You knew that there were two people claiming this money, is that right? A. Yes.

Q. Why didn't you go to your lawyer until the time that you were served with foreclosure? A. I did not know who to go to—I mean I did not—I could not pay two people. I had ready the money to pay.

Examination by the Court:

Q. Did you go to either one of them and explain to them—the two different people who claimed this interest? A. I told my son; he takes care of it.

Q. I understand that, but did you or did he go to either Perry or Sokol and tell them that they were both claiming the interest and find out to whom the interest was to be paid? A. My son would know better about that, he takes care of my things.

Q. You don't know whether he did or not? A. No.

Mr. Rosenstein: I have the letter from Perry & Son addressed to Max Mand, which I will offer in evidence.

(Marked Exhibit D-1)

HARRY MAND, called as a witness in behalf of the defendant, Max Mand, being first duly sworn according to law on his oath testified as follows:

Direct-examination by Mr. Nelson:

Q. What is your occupation? A. Public accountant.

Q. Are you related to the defendant, Max Mand? A. I am his son.

Q. Do you know who has attended to your father's business with regard to the payment of the interest on the mortgage that is involved in this suit? A. I took care of all of his business.

Q. When did you or your father first receive notice of the fact that Perry had an assignment of this mortgage? A. That is a letter from Perry sometime in July.

Q. Was that the first time you received any information concerning the assignment to Perry? A. Yes, sir, the first time that we knew that there was another party that had an interest in that mortgage.

Q. Did you on behalf of your father get in touch with Perry after that? A. No, knowing that Sokol had an assignment. We always told him we would pay him the money. I gave this letter to Sokol and told him to take care of it.

Q. Didn't you speak to somebody connected with the Perry Company?

Mr. Brams: He said no.

The Court: He said no the second time.

Q. Was your father ready at all times to pay this money? A. He had the money in the bank, and he said, "Who should I pay it to?" He said, "There are two parties claiming and you just wait

until the right one appears who is entitled to it and I will pay him." He did not want to pay twice.

Q. Did you have any conversation with Michael Sokol, the defendant in this cause? A. All during that time I said to Mr. Sokol, "Perry is after us" and he sent us this letter and you are taking care of it, and when November came around and we did not pay the interest we did not hear anything more from them until thirty days later. We told Mr. Sokol you are claiming the interest and he is claiming it. We will hold it until one appears that is entitled to it and will pay the one that is entitled to it.

Cross-examination by Mr. Brams:

Q. Mr. Mand, aren't you a law student? A. I am not.

Q. You did not attend law school? A. No.

Q. You did attend law school. A. Temporarily.

Q. I understand you told your father to sit by until someone proved that they were entitled to the money? A. I said until someone wants the money who will give it to the proper party.

Q. You received notice of the Perry assignment sometime in July in accordance with that letter? A. We got that letter that he had the mortgage.

Q. You did not go down to your father's lawyer or your father did not go down to his lawyer until he was served with foreclosure proceedings? A. Right.

Further cross-examination by Mr. Rosenstein:

Q. Mr. Mand were you present at the time that

title was closed for the property? A. I was.

Q. Were you present when the mortgage was executed? A. I was.

Q. Was Mr. Brams present at the time? A. He was.

Q. Was anything said at the time of the closing with respect to the assignment or the agreement for the assignment held by Mr. Sokol? A. There was.

Q. Will you state what was said and who said it? A. I was the one that called Sokol and Znahrenko together and asked Mr. Znahrenko, I said "What are you going to do about the Sokol assignment? So he said to me "My lawyer will take care of it. Mr. Brams said, "We will take care of it" and we started talking about the extras, there was a dispute about the extras, and that is all that was said about the assignment.

Q. Will you state exactly, if you can recall, what Mr. Brams said about that Sokol agreement? A. My father—

Q. No, what did Mr. Brams say, if you can recall, about the Sokol agreement?

Mr. Brams: Do I understand from Mr. Mand's statement that I was present at this conversation?

The Court: That is what he said, you and Mr. Znahrenko, and that the statement which is attributed to you was made in his presence.

Q. Can you recall the exact words used by Mr. Brams at the time? A. Yes, "We will take care of it."

Q. That was in Znahrenko's presence? A. Yes,

in answer to what Mr. Znahrenko was telling me.

Q. Your father was present at the same time? A. Yes, he was further down.

The Court: What do you want to prove?

Mr. Rosenstein: Mr. Sokol is the holder of the mortgage and the testimony that I hope to develop that he paid a cash consideration at the time when this agreement was given.

The Court: That is admitted on the record.

Mr. Rosenstein: I understand it to be stipulated that Perry & Son, the complainant, never made any inquiry of either Sokol or Mand the mortgagor with respect to any phase of the transaction in anticipation of taking the assignment.

The Court: There is no such admission on the record.

Mr. Rosenstein: I would ask an opportunity to prove that no inquiry has ever been made by Perry or anyone in their behalf in respect of any equities that the mortgagor knew of.

The Court: Inquiries of whom, Sokol?

Mr. Rosenstein: That no inquiry was made of the mortgagor.

The Court: That does not make any difference, he got an agreement to assign this mortgage.

Mr. Rosenstein: I want to prove the conversation had with the defendant Sokol and the representative of Perry & Son.

The Court: When? Prior to the commencement of the foreclosure suit.

Mr. Rosenstein: In connection with the conflicting demands for interest.

Harry Mand—Cross.

Mr. Nelson: Subsequent to the assignment?

Mr. Rosenstein: This witness had a conversation with an officer of the complainant and the officer of the complainant at that time stated to Mr. Sokol what the consideration was for the mortgage that he received.

The Court: That has all been admitted and is on the record.

Mr. Nelson: I desire to examine this witness in regard to a conversation that Mand had with him and the conversation which he had with Perry concerning the failure to pay the instalment within the thirty days.

The Court: All right.

MICHAEL SOKOL, called as a witness in behalf of the defendant , being first duly sworn according to law on his oath testified as follows:

Direct-examination by Mr. Nelson:

Q. After you received notice of the assignment of this mortgage to Perry did you have a conversation with Harry Mand or Max Mand, his father, in regard to this mortgage? A. That is how I got notice of the assignment to Perry. Either Harry Mand or his father called me up and told me they got a letter from Perry stating that Perry had an assignment of the mortgage which I had. I either went up to his house or he came to mine, I don't recall which, and he gave me the letter to him and told me to take care of it because it was my money there. He told me he would pay me the

interest, or Perry, but he does not know what to do. I wrote a letter to Perry, attention of Mr. Ruck—his name was on the letter—and Mr. Ruck came to my office and we discussed our priorities in this case and I told him that Mand had turned the letter over to me and he was willing to pay the interest but he does not know whether to pay it to him or me. I told him I believe I am entitled to it. He said he did not know. He did not see Mr. Brams. That is about all we spoke about it.

The Court: When was it that you had that conversation?

Witness: That must have been about July 29th or so, because Mand got the letter on the 26th or 27th and I immediately wrote to Perry and Mr. Ruck came down probably the next day.

The Court: That was before the interest was due?

Witness: That was after the first interest which was paid to Znahrenko, but about four months prior to the second interest payment. I have forgotten the date when Znahrenko got the interest and never turned it over to Perry. Perry wrote a letter in July to Mand demanding the previous interest in May and I wrote him telling him that the interest had been paid to Znahrenko and that he would pay our interest, but he will have to fight for it from now on. Perry never got that first interest, although he got an assignment in April and the interest was due him in May. Perry did not notify Mand until July 26th and that was two months after the interest was due.

Michael Sokol—Cross.
Max Mand—Recalled—Cross.

Q. What is your occupation? A. I am an attorney.

Cross-examination by Mr. Brams:

Q. You knew in July that Perry demanded the interest? A. I did.

Q. You spoke to the Mands concerning that matter? A. Yes.

Q. Did you advise the Mands as an attorney to go into the courts to decide this matter? A. I did not advise him to go to court, I was not his attorney in the matter.

Q. You and Mand are friendly? A. We are, and we also have business relationships.

MAX MAND, recalled.

Further cross-examination by Mr. Rosenstein:

Q. Mr. Mand, did Perry & Son at any time make any inquiry of you before they took the assignment of the mortgage? A. No.

Q. Did they ever communicate with you in any way at all before they took the assignment of the mortgage? A. No.

Q. Either by letter, telephone or representative? A. No, sir.

Mr. Brams: I object to that as immaterial so far as this defendant is concerned.

The Court: If it is immaterial it does not bind you. It is in now.

Mr. Brams: There was some statement made by one of the witnesses regarding a

certain conversation at which I was present. I would like to take the stand.

The Court: You may do so under the circumstances.

HERMAN W. BRAMS, being first duly sworn according to law on his oath testified as follows:

The Court: The statement as I recall, to which you refer, was by the young man who said that at the time of the settlement when that mortgage was given, the settlement was made in your office in the presence of Mr. Znahrenko and yourself and that at that time the agreement of assignment to Sokol was discussed and he asked what was going to be done with that and that Mr. Znahrenko said you would take care of it and you replied "Yes, we will take care of it."

Witness: I deny such a conversation and deny having said any such thing.

Cross-examination by Mr. Rosenstein:

Q. Mr. Brams, you drew the original assignment from Znahrenko to Lapitsky? A. I drew them all, they are all on record.

The Court: That is already on the record.

Q. You knew the history of the transactions between Lapitsky and Znahrenko? A. I knew all the transactions, but I did not know of the Sokol transaction.

Q. You knew on February 19th, having drawn the agreement with Lapitsky which assigned the mortgage to Znahrenko?

The Court: He has already said he did. He knows all about the whole transaction except the Sokol agreement.

Q. And particularly, that this last assignment was not recorded for a period of eight weeks? A. Which last?

Q. The assignment of Lapitsky to Znaharenko. A. That is not the last.

Q. I say, on February 19th, 1929, Lapitsky reassigned the mortgage to Znaharenko? A. Correct.

The Court: He knows the particulars if he knows the generalities, because the generalities include the particularities. He says he knows them all.

Q. You drew the assignment to Perry? A. I did.

Q. At that time you knew there was an unrecorded assignment made eight weeks prior thereto to Lapitsky? A. Yes, sure.

Q. Did you say anything to Perry about that? A. Yes, that is why I got the other assignment back to Znaharenko. He knew about it.

Q. You told Perry all about it? A. Yes.

Q. So Perry knew there was an unrecorded assignment for a period of eight weeks? A. To Lapitsky.

Q. You told Perry all about the other assignments and reassignments to Lapitsky? A. There are only two other assignments.

Q. Did you ever make any inquiry of Mand, the mortgagor, with respect to the mortgage? A. No.

Q. Did you ever ask him whether there was any defects or any inherent equities existing with re-

spect to that mortgage? A. When Perry wanted an assignment of the mortgage I made a search of the record and found nothing on record and asked him nothing.

Q. You did nothing with respect to ascertaining any information with respect to the mortgage made by Mand? A. No.

Conclusions.

IN CHANCERY OF NEW JERSEY.

Between GEORGE F. PERRY & SONS, INC., Complainant, and MAX MAND, *et als*, Defendants.	On Bill to Foreclose. On Final Hearing. Conclusions. Docket 76, page 486.

HERMAN W. BRAMS, ESQ., for Complainplainant.

GEORGE H. ROSENSTEIN, ESQ., for Defendant Michael Sokol.

SAMUEL H. NELSON, ESQ., for Defendants Max Mand and Sarah Mand.

SYLLABUS.

1. One who takes an assignment of a mortgage for a pre-existing debt is not a bona-fide holder *for value*, and takes it subject to equities created by his assignor in favor of another.

2. Such an assignee cannot maintain a bill to foreclose the mortgage when the mortgagor defends on the ground of title to the mortgage in another, and the equitable owner is impleaded and asserts his rights.

BERRY, *V. C.*

Complainant seeks to foreclose a mortgage which he holds by assignment for a pre-existing debt from the mortgagee who had, previous to the execution

of the mortgage, agreed in writing to assign it to the defendant Sokol for a then present valuable consideration. The defendant Mand, the mortgagor, *defends* on the ground that the complainant is *not the owner of the mortgage*, and has impleaded the defendant Sokol who also claims the interest. The agreement to assign is dated July 20, 1928 and was recorded July 26, 1928. The bond and mortgage are dated November 16, 1928 and the assignment to the complainant, April 12, 1929 and recorded April 18, 1929. The agreement was, in effect, an equitable assignment. That such an agreement will be sustained in equity, see Cogan v. Conover, 69 N. J. Eq. 358. When interest fell due on the mortgage it was demanded by the complainant, but the mortgagor, who had notice of the agreement to assign, refused to pay either claimant until their respective rights to the mortgage and the interest due thereon were established. While ordinarily an assignee of a mortgage take free of latent equities created by the mortgagee in favor of strangers (New Jersey Discount Company v. Telesca, 101 N. J. Eq. 426), an assignee, to come within that rule must have given value for his assignment. If not, although he has the legal title to the mortgage, his rights are determined as though he had a mere equity. Tate v. Security Trust Company, 63 N. J. Eq. 559; Pomeroy's Equity Jurisprudence, Sec. 417. Considered in this light the defendant Sokol's equity is superior because prior in time.

The instant case is practically on all fours with Tate v. Security Trust Company, *supra*. Sokol stands in the place of Tate, and Perry & Son, Inc. in the place of the Trust Company. There, Tate was the equitable owner of the mortgage and the

Trust Company had received an assignment of it as security for a pre-existing debt without notice of Tate's rights. This court pronounced Tate's rights superior to those of the Trust Company. See also Kamena v. Heulbig, 23 N. J. Eq. 78; Martin v. Bowen, 51 N. J. Eq. 452; Lawshe v. Trenton Banking Company, 87 N. J. Eq. 56. While the Uniform Sales of Goods Act (P. L. 1907, p. 341) 4 C. S., p. 4645) provides that where goods are taken in satisfaction of or as security for an antecedent debt, such debt shall constitute "value", it is to be noted that the word "goods" as used in that act does not include "things in action or money." See Sec. 76. The defendant Sokol has answered with a mere statement of his claim and does not seek foreclosure, alleging no default on the part of the mortgagor for non-payment of interest to which he assented. A decree will be entered determining Sokol to be the owner of the mortgage and entitled to the interest thereon, *equity considering* as done that which ought to have been done. Complainant, not being entitled to the mortgage cannot foreclose it. The bill will, therefore, be dismissed.

October 18, 1930.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between GEO. F. PERRY & SONS, INC., a corp. of New Jersey, Complainant, and MAX MAND, *et als*, Defendants.	On Bill &c. Final Decree.

This cause having come on to be heard in the presence of Herman W. Brams, Esq., Solicitor of the Complainant, the Bill of Complaint having been filed herein to foreclose a certain mortgage on the premises mentioned and described in the Bill of Complaint herein, and it appearing that the aforesaid mortgage held by the Complainant herein was assigned to it by one Arthur Znaharenko, the then mortgagee for a pre-existing debt; and that previous to the execution of the mortgage in question the Complainant's assignor, Arthur Znaharenko, agreed in writing on July 20th, 1928, to assign said mortgage for a present valuable consideration to defendant, Michael Sokol, as additional collateral for the payment of a certain bond secured by a mortgage duly executed in the sum of $2000.00 and recorded on July 26th, 1928, in the office of the Register of the County of Essex, State of New Jersey, in book C 65 of Mortgages, pages 230-232, said mortgage covering premises 31 Union Place, Irvington, New Jersey, which aforementioned agreement was recorded on July 26th,

1928, in the office of the Register of the County of Essex, State of New Jersey; and that the bond and mortgage assigned to Complainant by the aforesaid Arthur Znaharenko are dated November 16th, 1928, and were assigned to Complainant on April 12th, 1929, and recorded on April 18th, 1929; and that interest on said mortgage was demanded by the Complainant but payment was refused by the defendant, Max Mand, the mortgagor, who had notice of the agreement by the aforesaid Arthur Znaharenko to assign the said mortgage to the defendant, Michael Sokol; and that the defendant, Michael Sokol, likewise demanded the interest on the mortgage aforesaid; and that the defendant mortgagor, Max Mand, refused to pay either claimant until their respective rights to the mortgage and the interest due thereon were established; and that the defendant mortgagor, Max Mand, filed an answer to the Bill of Complaint herein denying that he was in default with respect to the terms and conditions of the mortgage, and a counterclaim impleading the defendant, Michael Sokol, and praying that the respective rights of the defendant, Michael Sokol, and the Complainant in and to the Principal of the mortgage and interest thereon be determined and established; and it further appearing that the said interest amounted to the sum of $78.00 and was deposited with the Clerk of this Court in this cause by said defendant, Max Mand; and it appearing that the defendant Michael Sokol, has duly filed with the Clerk of this Court a statement in writing of his claim to the mortgage herein and the interest thereon as aforesaid;

And this cause having come on to be heard in the presence of Samuel H. Nelson, Solicitor of the defendant, Max Mand, and George H. Ro-

senstein, Solicitor of the defendant, Michael Sokol, and the Court having examined the pleadings and the statement of the defendant, Michael Sokol, and having taken proofs orally in open Court of the Complainant and the defendants, and heard and considered the arguments of counsel and examined the exhibits introduced in evidence herein, and it appearing to the satisfaction of the Court that the defendant, Michael Sokol, is the equitable and real owner of the mortgage in question and the bond which said mortgage was given to secure, to the extent and in the manner provided for in the agreement between the aforesaid Arthur Znaharenko and defendant, Michael Sokol, dated July 20th, 1928, and that the defendant, Michael Sokol, is entitled thereto and to the interest thereon and proceeds thereof as aforesaid; and it further appearing that at the time of the filing of the answer and counterclaim by the defendant mortgagor, Max Mand, in this cause, the latter paid into this Court the sum of $78.00 for accured interest and that the same with accumulated interest thereon since accrued, still remains deposited in this Court subject to the order and direction thereof; and it further appearing that the defendant, Michael Sokol, as the equitable and real owner of the bond and mortgage aforesaid, to the extent provided in the agreement aforesaid, did not seek foreclosure and alleged no default on the part of the defendant mortgagor, Max Mand; and it further appearing that the Complainant, not being entitled to the mortgage could not enforce any foreclosure thereof,

It is thereupon, on this 16th day of December, 1930,

Final Decree.

ORDERED, ADJUDGED and DECREED, that the Bill of Complaint heretofore filed herein by the Complainant be and the same hereby is dismissed with costs; and it is further

ORDERED, ADJUDGED and DECREED, that the defendant mortgagor, Max Mand, shall, within ten days from the date hereof, deposit with and pay to the Clerk of this Court subject to the further order of this Court, the principal sum of the mortgage executed by him on November 16th, 1928, amounting to the sum of $2600.00 together with interest to be computed up to and including the date hereof whereupon the said defendant, Max Mand, shall be discharged and relieved from any and all further liability thereunder; and it is further

ORDERED, ADJUDGED and DECREED, that the defendant, Michael Sokol, be and he hereby is the true and rightful owner of the mortgage dated the 16th day of November, 1928, and the bond dated the 16th day of November, 1928, which the mortgage aforesaid was given to secure to the extent and in the manner provided in the agreement between Arthur Znaharenko and defendant, Michael Sokol, dated July 20th, 1928, said mortgage being recorded in the office of the Clerk of the County of Essex on the 19th day of November, 1928, in Book W 65 of Mortgages on page 532, and covering the property mentioned and described in the Bill of Complaint as follows:

> Premises in the Township of Maplewood, County of Essex, State of New Jersey.
>
> BEGINNING in the Northeasterly line of Garfield Place at a point distant therein 200 feet Southeasterly from the intersection of said Northeasterly line of Garfield Place

with the Southerly line of Coolidge Road; running thence (1) along said Northeasterly line of Garfield Place South 49 degrees 30 minutes East 50 feet; thence (2) North 40 degrees 30 minutes East at right angles to Garfield Place 157 feet; thence (3) North 49 degrees 30 minutes West parallel with Garfield Place 50 feet; thence (4) South 40 degrees 30 minutes West parallel with second course herein 157 feet to the aforesaid Northeasterly line of Garfield Place and the point or place of BEGINNING.

And it is further

ORDERED, ADJUDGED and DECREED, that Geo. F. Perry & Sons, Inc., the Complainant herein, within ten days after service upon it of a true but uncertified copy of this decree, shall surrender and deliver up to the defendant, Michael Sokol, the bond and mortgage aforesaid together with the assignment of the said mortgage by Arthur Znaharenko to it; and that the said Complainant shall execute and deliver simultaneously therewith, and within the time aforesaid, a proper instrument assigning and transferring the said mortgage to the defendant, Michael Sokol, which said instrument shall be duly executed and in recordable form; and it is further

ORDERED, ADJUDGED and DECREED, that the defendant, Michael Sokol, is, subject to the provisions hereinafter contained, entitled to the interest on the mortgage aforesaid amounting to the sum of $78.00 so paid into Court as aforesaid, together with all accumulations of interest thereon; and that the balance, after deducting the lawful commissions of the Clerk of this Court on the sum paid into this Court as aforesaid now remaining

deposited therein, together with all interest accumulated thereon, be paid to the defendant, Michael Sokol, or to his Solicitor as hereinafter provided; and it is further

ORDERED, ADJUDGED and DECREED, that the principal sum of the mortgage aforesaid, held by Complainant together with the proceeds, interest and accruals thereof be deposited with and held by the Clerk of this Court until the foreclosure proceedings heretofore instituted by the Lithuanian Building and Loan Association against Andrey Lapitsky and against Arthur Znaharenko shall have been completed and the property in question sold under a decree of this Court in said proceedings; and that the defendant, Michael Sokol, shall be thereupon entitled to receive the proceeds of the money deposited with the Clerk of this Court as aforesaid to the extent of any deficiency resulting to defendant, Michael Sokol, in respect to the mortgage held by him covering premises 31 Union Place, Irvington, New Jersey, by reason of the foreclosure proceedings respecting said premises, in the foreclosure proceedings heretofore instituted by him, any and all surplus thereafter remaining, if any, to belong to, and to be paid to Geo. F. Perry & Sons Inc., the Complainant; and in the event of any deficiency in respect to the aforementioned mortgage, and upon the payment of said deficiency to said defendant, Michael Sokol, the Complainant, Geo. F. Perry & Sons, Inc., to be and to thereupon become subrogated to any and all rights of defendant, Michael Sokol, in and to the bond and/or the mortgage dated July 26th, 1928, and recorded in the office of the Register of the County of Essex, State of New Jersey, in book

C-65 of Mortgages, pages 230-232, covering premises 31 Union Place, Irvington, New Jersey; and it is further

ORDERED, ADJUDGED and DECREED, that the Complainant, Geo. F. Perry & Sons, Inc., pay to the defendant, Michael Sokol, his costs in this cause to be taxed or to George H. Rosenstein, Solicitor of said defendant.

ORDERED, ADJUDGED and DECREED, that the Complainant, Geo. F. Perry & Sons, Inc., pay to the fendant, Max Mand, his costs in this cause to be taxed including a counsel fee to Samuel H. Nelson, Solicitor for said defendant, in the sum of $100, which said costs and counsel fee are hereby allowed; and it is further

ORDERED, ADJUDGED and DECREED, that within ten days after service upon an officer of the Complainant or its Solicitor of a copy of this decree and a copy of the bill of taxed costs of the respective defendants herein certified to by the Solicitor of either of the defendants, the said taxed costs and counsel fees shall be paid to the respective Solicitors of the defendants by the Clerk of this Court out of the proceeds deposited with said Clerk by the defendant, Max Mand.

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V. C.

Abridgement of Exhibits.

IN CHANCERY OF NEW JERSEY.

76-486.

Between GEO. F. PERRY & SONS, INC., a corp. of New Jersey, Complainant, and MAX MAND, *et als*, Defendants.	On Bill, etc. Abridgment of Exhibits.

It has been stipulated and agreed by and between counsel that instead of printing in full certain exhibits the following statement of the contents of the same would be sufficient.

Exhibit C-1.

Mortgage made by Max Mand to Arthur Znaharenko, dated November 16, 1928, in the sum of $2600.00, covering property in the Township of Maplewood, Essex County, New Jersey, on the northeasterly line of Garfield Place, which mortgage was acknowledged November 16, 1928, and recorded November 19, 1928 in Book W-65 of Mortgages for Essex County, on pages 532-534. This mortgage according to its terms became due on November 16, 1930, and bore interest at the rate of six per cent, payable semi-annually.

Exhibit C-2.

Bond dated November 16, 1928, made by Max

Mand to Arthur Znaharenko, in the penal sum of $5200.00, conditioned for the payment of $2600.00, on November 16, 1930, with interest at six per cent, payable semi-annually.

Exhibit D-4.

Mortgage made by Arthur Znaharenko to Michael Sokol, in the sum of $2,000, dated July 20, 1928, covering property in the Township of Irvington, Essex County, New Jersey, located on Union Place, which mortgage was acknowledged July 23, 1928, and recorded July 26, 1928 in Book C-65 of Mortgages for Essex County, on pages 230-232. This mortgage according to its terms became due on July 20, 1929, and bore interest at the rate of six per cent, payable semi-annually.

Exhibit D-3.

Bond dated July 20, 1928, made by Arthur Znaharenko to Michael Sokol, in the penal sum of $4,000.00, conditioned for the payment of $2,000.00 on July 20, 1929, with interest at six per cent, payable semi-annually.

Exhibit C-3.

Know all Men by these Presents, That

ARTHUR ZNAHARENKO, Single,

party of the first part, in consideration of the sum of One Dollar and other good and valuable consideration, lawful money of the United States of America, to him in hand paid by

ANDREY LAPITSKY,

party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part

Indenture of Mortgage bearing date the 16th day of November, One Thousand Nine Hundred and Twenty-eight, made by Max Mand on lands in Maplewood, Essex Co. New Jersey, to secure the payment of the sum of Twenty-six Hundred ($2600.00) Dollars, which mortgage is recorded in the Register's office of the County of Essex in Book W 65 of Mortgages, pages 532.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the same unto the said party of the second part, his heirs, executors, administrators or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at his proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and

Exhibit C-3.

interest; and in case of payment, to discharge the same as fully as he might or could do if these presents were not made: And do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Twenty-six Hundred ($2600.00) Dollars.

In Witness Whereof, I have hereunto set my Hand and Seal the 14th day of February in the year of our Lord One Thousand Nine Hundred and Twenty-nine.

ARTHUR ZNAHARENKO (L.S.)

Signed, Sealed and Delivered
in the presence of
Frances Brams.

State of New Jersey, }
County of Essex, } ss.:

Be it Remembered, That on this 14th day of February in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, before me A Master in Chancery of N. J. personally appeared

Arthur Znaharenko

who, I am satified is the assignor in the within Deed of Assignment named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

HERMAN W. BRAMS,
A Master in Chancery of N. J.

Endorsed—Assignment of Mortgage.—Arthur Znaharenko to Andrey Lapitsky. Dated February 14, 1929. Received in the Register's Office of the

Exhibit C-3.

County of Essex, N. J. on the 26th day of February, A. D., 1929, at 11:30 o'clock, in the forenoon, and recorded in Book 206 of Assignments of Mortgages for said County, on page 303.—Howard S. Dodd, Register.

Exhibit C-4.

Know all Men by these Presents, That

ANDREY LAPITSKY,

party of the first part, in consideration of the sum of One Dollar and other good and valuable consideration, lawful money of the United States of America, to him in hand paid by

ARTHUR ZNAHARENKO,

party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part

Indenture of Mortgage bearing date the 16th day of November, One Thousand Nine Hundred and Twenty-eight, made by Max Mand on lands in Maplewood, Essex Co. New Jersey, to secure the payment of the sum of Twenty-six Hundred ($2600.00) Dollars, which mortgage is recorded in the Register's office of the County of Essex in Book W 65 of Mortgages, pages 532.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the

Exhibit C-4.

same unto the said party of the second part, his heirs, executors, administrators or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at his proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as he might or could do if these presents were not made: And do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Twenty-six Hundred ($2600.00) Dollars.

In Witness Whereof, I have hereunto set my Hand and Seal the 19th day of Feb. in the year of our Lord One Thousand Nine Hundred and Twenty-nine.

ANDREY LAPITSKY (L.S.)

Signed, Sealed and Delivered
in the presence of
Frances Brams.

State of New Jersey, }
County of Essex, } ss.:

Be it Remembered, That on this 19th day of February in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, before me A Master in Chancery of N. J. personally appeared

Andrey Lapitsky

who, I am satified is the assignor in the within Deed of Assignment named; and I having first made known to him the contents thereof, he did

acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

HERMAN W. BRAMS,
A Master in Chancery of N. J.

Endorsed—Assignment of Mortgage—Andrey Lapitsky to Arthur Znaharenko. Dated, Feb. 19th, 1929. Received in the Register's Office of the County of Essex, N. J. on the 18th day of April, A. D., 1929, at 2:57 o'clock, in the afternoon, and recorded in Book 207 of Assignments of Mortgages for said County, on page 38—Howard S. Dodd, Register.

Exhibit C-5.

Know all Men by these Presents, That

ARTHUR ZNAHARENKO,

party of the first part, in consideration of the sum of One Dollar and other good and valuable consideration, lawful money of the United States of America, to him in hand paid by

GEO. F. PERRY & SONS, INC.,

party of the Second Part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer, and set over unto the said party of the second part

Indenture of Mortgage bearing date the 16th day of November, One Thousand Nine Hundred and

Exhibit C-5.

Twenty-eight, made by Max Mand on lands in Maplewood, Essex Co. New Jersey, to secure the payment of the sum of Twenty-six Hundred ($2600.00) Dollars, which mortgage is recorded in the Register's office of the County of Essex in Book W 65 of Mortgages, pages 532.

Together with the bond or obligation therein described, and the money due and to grow due thereon, with the interest. To Have and to Hold, the same unto the said party of the second part, his heirs, executors, administrators or assigns forever, subject only to the proviso in the said Indenture of Mortgage mentioned: And do hereby make, constitute, and appoint the said party of the second part my true and lawful attorney, irrevocable, in my name, or otherwise, but at his proper costs and charges, to have, use and take all lawful ways and means for the recovery of all the said money and interest; and in case of payment, to discharge the same as fully as he might or could do if these presents were not made: And do hereby covenant, promise and agree, to and with the said party of the second part, that there is now due and owing upon the said Bond and Mortgage the sum of Twenty-six Hundred ($2600.00) Dollars.

In Witness Whereof, I have hereunto set my Hand and Seal the 12th day of April in the year of our Lord One Thousand Nine Hundred and Twenty-nine.

ARTHUR ZNAHARENKO (L.S.)

Signed, Sealed and Delivered
in the presence of
Frances Brams.

Exhibit C-5.

State of New Jersey, }
County of Essex, } ss.:

Be it Remembered, That on this 12th day of April, in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, before me A Master in Chancery of N. J. personally appeared

Arthur Znaharenko

who, I am satified is the assignor in the within Deed of Assignment named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

HERMAN W. BRAMS,
A Master in Chancery of N. J.

Endorsed—Assignment of Mortgage—Arthur Znaharenko to Geo. F. Perry & Sons, Inc. a corp. of N. J. Dated, April 12th, 1929. Received in the Register's Office of the County of Essex, N. J. on the 18th day of April, A. D., 1929, at 2:56 o'-clock in the afternoon, and recorded in Book 207 of Assignments of Mortgages for said County, on pages 37-38—Howard S. Dodd, Register.

Exhibit D-1.

Know All Men by These Presents that I, Arthur Znaharenko, single, of the Town of Irvington, County of Essex and State of New Jersey, hereinafter called the assignor, in consideration of One ($1.00) Dollar and other good and valuable considerations do hereby agree for myself, my heirs, executors and assigns to assign to Michael Sokol,

Exhibit D-1.

single, of the City of Newark, County of Essex and State of New Jersey, hereinafter called the assignee, his heirs, executors and assigns, a certain bond and mortgage to be executed by Max Mand and Sarah, his wife, to me the said assignor as part of the purchase price for the premises known as 175 Garfield Place, Maplewood, N. J. upon which premises I am building a one-family house for the said Max and Sarah Mand.

To Have and to Hold the same unto the assignee, his heirs, executors and assigns forever.

This Assignment is to be executed as collateral security for a certain mortgage executed by Arthur Znaharenko to Michael Sokol on the 26th day of July, 1928, recorded in the Essex County Register's Office, #43 covering premises known as 31 Union Place, Irvington, New Jersey. The assignor agrees to execute the said assignment upon the execution of the mortgage of the said Max and Sarah Mand to the assignor; said assignment to remain in full force and affect until the within mentioned mortgage, plus interest, from Arthur Znaharenko to Michael Sokol shall be fully paid.

In Witness Whereof, the assignor has hereunto set his hand and seal this 20 day of July, 1928.

ARTHUR ZNAHARENKO (L.S.)

Signed, Sealed and Delivered
in the presence of:
Michael Sokol.

State of New Jersey, }
County of Essex, } ss.:

Be It Remembered, That on this 23rd day of July, in the year of our Lord One Thousand Nine Hundred and Twenty-eight, before me the subscrib-

Exhibit D-1.

er, an Attorney at Law of N. J., personally appeared Arthur Znaharenko, who I am satisfied, is the covenantor mentioned in the within Agreement to Assign Mortgage and to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

JULIUS STEIN,
An Attorney at Law
of New Jersey.

Endorsed: Agreement to Assign Mortgage—Arthur Znaharenko, Single, to Michael Sokol, Single. Dated: July 20th, 1928—Received in the Register's Office of the County of Essex, N. J. on the 26th day of July, A. D., 1928, at 11:24 o'clock in the forenoon, and Recorded in Book 200 of Assignments of Mortgages for said County, on pages 272. Howard S. Dodd, Register.

Exhibit D-2.

GEO. F. PERRY & SONS, INC.
MASONS MATERIALS
Concrete Block
Fabyan Place & Lyons Ave.
NEWARK, N. J.

Phone Terrace 0060-1-2

July 26, 1929.

Mr. Max Mand,
175 Garfield Place,
Maplewood, N. J.

Dear Sir:

Sometime ago Mr. Arthur Znaharenko assigned to us a certain mortgage on which you are named as the mortgagor, which mortgage was in the sum of $2600.00.

On May 16th, 1929 there was an interest instalment of $78.00 due on this mortgage. Will you kindly send us your remittance in this amount so that we can credit your account accordingly.

All future instalments of interest and principal will be payable to ourselves unless otherwise advised.

Yours very truly,

GEO. F. PERRY & SONS, INC.
H. J. Ruck,
Sec'y.

HJR/PB

New Jersey Court of Errors and Appeals

Between GEO. F. PERRY & SONS, INC., a corporation of New Jersey, Complainant-Appellant, and MAX MAND, *et als.*, Defendants-Respondents.	On Bill, etc. On Appeal from Court of Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

Facts.

This is an appeal from a final decree advised by the Hon. Vice-Chancellor Maja Leon Berry. The decree under review dismissed the bill of complaint, although there are other portions of the decree which are not material in connection with this appeal.

Complainant's bill was to foreclose a mortgage of $2600.00 assigned to it by one Arthur Znahrenko. The material facts involved in this case were not in dispute and were practically conceded by all parties in interest.

In May 1928 a contract was entered into between Arthur Znahrenko and Max Mand, one of the defendants, for the sale of property known as #175 Garfield Pl., Maplewood, N. J. The contract provided for the closing of title some time in August 1928. According to its terms, there was to be given by Mand to Znahrenko a purchase

money mortgage to secure part of the purchase price. For reasons satisfactory to the contracting parties, title was not closed until November 16th, 1928.

In the meantime, on July 26th, 1928, Znahrenko, the vendor (and later mortgagee), borrowed from Michael Sokol another defendant, the sum of $2,000.00 and to secure the payment of this loan, executed a mortgage on other premises owned by him located at 31 Union Pl., Irvington. This mortgage was dated July 26th, 1928 and recorded in Book C 65 of mortgages for Essex County pages 230-232 (See Exhibit D-3 and D-4, State of Case, page 48). Znahrenko offered to Sokol, as additional collateral security for the payment of the $2,000.00 so borrowed, an assignment of the mortgage which he expected to receive from Mand under the terms of the contract just described. Inasmuch as title had not then closed to the Garfield Pl. property, a written agreement was entered into between Znahrenko and Sokol (See Exhibit D-1, State of Case, page 55-57) under the terms of which Znahrenko agreed to assign to Sokol the mortgage which would be executed and delivered by Mand to Znahrenko covering the Garfield Pl. property. This latter agreement was recorded in the Essex County Register's office on July 26th, 1928 in Book 200 of Assignment of Mortgages for said County, page 272.

On November 16th, 1928, title to the Garfield Pl. property was closed and, pursuant to the contract herein described, Max Mand executed and delivered a bond and mortgage dated November 16th, 1928 in the sum of $2600.00 covering the Garfield Pl. property. This mortgage was recorded in the Essex County Register's office in Book W 65 of Mortgages for said County, pages 532-534. (See Exhibit C-1 and C-2, State of Case, pages 47-48).

Znahrenko was in physical possession of the bond and mortgage just described and notwithstanding the terms of the agreement between him and Sokol (See Exhibit D-1) he did not assign this bond and mortgage to Sokol, and apparently with the consent of Sokol, collected the first installment of interest which became due May 16th, 1929 (See State of Case, page 32, lines 24-40). Znahrenko also made an assignment of the bond and mortgage to one Andrey Lapitsky (See Exhibit C-3, pages 49-51) but Lapitsky assigned same back to Znahrenko (See Exhibit C-4, State of Case, pages 51-53).

On April 12th, 1929, Znahrenko made and executed an assignment of the bond and mortgage (Exhibit C-1 and C-2) to the complainant, which assignment was recorded in the Essex County Register's office on April 18th, 1929 in Book 207 of Assignment of Mortgages for said County, pages 37-38.

On July 26th, 1929 complainant notified the defendant Mand, the mortgagor, that the assignment had been made and demanded payment of the interest which had become due in May and also notified Mand that all future installments of interest and principal would be payable to it. (See Exhibit D-2, State of Case, page 58). This last letter was brought to the attention of Sokol by Mand, and inasmuch as both complainant and Sokol claimed the interest and principal due on the bond and mortgage (Exhibit C-1 and C-2) Mand refused to pay either one of them and complainant subsequently filed a bill to foreclose its bond and mortgage.

The learned Vice-Chancellor, by the final decree which he advised, dismissed the complainant's bill and provided that the face amount of the mortgage, with interest, should be paid into the Court

of Chancery until the determination of a foreclosure suit which had been instituted against the premises #31 Union Pl., Irvington, on which the defendant Michael Sokol held his primary mortgage of $2,000.00 (Exhibit D-4) and further decreed that in the event of any deficiency arising by virtue of that foreclosure, the deficiency should be paid out of the principal sum of the mortgage described in complainant's bill and that the balance. if any, should be paid to complainant.

In the opinion which the learned Vice-Chancellor filed (See State of Case, pages 37-39) he based his conclusions upon the principle that while ordinarily an assignee of a mortgage takes title free of latent equities created by the mortgagee in favor of strangers, an assignee, to come within that rule, must have given value for his assignment, and if not, although the assignee had legal title to the mortgage, his rights were to be determined as though he had a mere equity, and that considered in that light, the defendant, Michael Sokol's equity was superior to the complainant's equity, because it was prior in point of time.

The learned Vice-Chancellor took the position that the assignment to the complainant was not based upon a valuable consideration, because it had been given for a pre-existing debt, while the equitable assignment to Solkol was based upon a then present valuable consideration.

Appellant seeks to reverse the final decree of the Court of Chancery because it contends that the assignment to complainant of the mortgage described in the bill of complaint was *for a valuable consideration,* inasmuch as it was given, not as security for a pre-existing or antecedent indebtedness, but in actual payment of a pre-existing debt,

and that the complainant, in accepting the assignment:

(1) Cancelled its claim against its original debtor;

(2) Gave up its right of mechanics lien against the property to which it had delivered building materials;

(3) Irrevocably extended the due date of its indebtedness;

(4) Surrendered its right of action against its original debtor and accepted in place and stead thereof the bond of Max Mand, secured by the mortgage in question.

Thus complainant became entitled to the status of a bona fide purchaser for value, and its right to foreclose the mortgage should have been sustained.

Argument.

It is conceded by appellant that the agreement between Znahrenko and Sokol (Exhibit D-1, State of Case, pages 55-57) constituted an equitable assignment.

We do not believe there is any controversy between the parties that the recording of the agreement just mentioned did not in any way add to its legal effect. This is apparent from reading Section 21 of the Conveyance Act, found in Vol. 1, Cumulative Supplement, at page 627 (1911-1924).

There is only one question to be decided in this case, and that is—under the circumstances which existed, was the assignment of the mortgage described in the bill of complaint supported by a consideration which entitled the complainant to the benefits of a "bona fide holder"? The learned Vice-Chancellor said no. Appellant says yes.

Let us consider briefly the question of fact which is involved. As has already been stated, there was no dispute by any of the parties to this suit with regard to any of the material facts in this controversy. The one important question of fact in the case was the question of the consideration for the assignment of the mortgage described in the bill of complaint made by Arthur Znahrenko to the complainant. The following, taken from State of the Case, pages 21 and 22, is everything that there is in the record on this particular point.

> "Mr. Rosenstein: Will complainant state what the consideration was for the assignment of the mortgage given to it by Znahrenko?
>
> The Court: Is there any question about that?
>
> Mr. Rosenstein: Our point is that it was an antecedent indebtedness, that this assignment of mortgage was given in discharge of an antecedent indebtedness.
>
> The Court: Where and how does that become material?
>
> Mr. Rosenstein: In this respect—
>
> The Court: It becomes material because of your assertion that you had an equitable assignment?
>
> Mr. Rosenstein: Yes.
>
> The Court: If they had notice of that equitable assignment perhaps they are bound. Suppose they did not have notice?
>
> Mr. Rosenstein: Irrespective of whether or not they had notice, the law has been settled that as between the question of priorities, where the equitable assignment was based upon a consideration flowing at the very time, that it will take precedence to the extent of that assignment over a subsequent assignment of mortgage to discharge a pre-existing indebtedness.
>
> The Court: If you think it is material let

> the facts be stipulated. If they are not stipulated, you can call witnesses and find out what they are.
>
> Mr. Brams: My client supplied Arthur Znahrenko with a carload of material in the building of various houses. That debt was past due and my client said to Mr. Znahrenko, "We have not received payment of this money." Mr. Znahrenko said, "I have not got the money." "What have you got to give us in payment of it?" Mr. Znahrenko said, "I have a mortgage of $2600 and I will assign this mortgage to you in payment." The assignment and the money was credited against the account of Arthur Znahrenko."

Admittedly then, it must be conceded that the complainant's position as to the consideration for the assignment of the mortgage was as follows:

1. Complainant accepted the bond and mortgage (Exhibits C-1 and C-2) assigned to it in absolute payment to its account against Arthur Znahrenko, its original debtor, and cancelled its claim against him.

2. The original indebtedness being for materials sold and delivered by complainant to Arthur Znahrenko, in connection with the building of various houses, complainant had a right to file a mechanic's lien on all such properties, and this right it surrendered.

3. Complainant's claim against Arthur Znahrenko was, at the time of the assignment, due and owing, and by accepting the assignment of the bond and mortgage, it postponed irrevocably the due date of its claim until the due date of the mortgage, which was November 16th, 1930, an extension from April 12th, 1929 to November 16th, 1930.

4. Complainant surrendered any right of action it had against Arthur Znahrenko and accepted in place and stead thereof, the bond of Max Mand (Exhibit C-1) secured by the mortgage Exhibit C-2.

This being so, what was the legal effect created by the assignment to complainant under the circumstances just related?

One of the early and leading cases on this particular subject is *Vredenburgh* vs. *Burnet,* 31 N. J. Eq. 229, in which case the Court of Chancery said:

> "The established doctrine of this court is, that the assignee of a mortgage takes it subject to all the defenses which the mortgagor, or those who have succeeded to his rights, may urge against it, but free from latent or secret equities, created by the mortgagee in favor of third persons. *Losey* vs. *Simpson,* 3 Stock, 254; *Woodruff* vs. *Depue,* 1 McCart. 175; *Lee* vs. *Kirkpatrick,* Id. 264; *Starr* vs. *Haskins,* 11 C. E. Gr. 415; *DeWitt* vs. *Van Sickle,* 2 Stew. 212; *Putnam* vs. *Clark,* Id. 415."

From this time on, the Court of Chancery reaffirmed this doctrine in numerous cases.

See

Magie vs. *Reynolds,* 51 N. J. Eq. 113, 26 A. 150.

Davis vs. *Piggott,* 57 N. J. Eq. 619; 42 Atl. 768;

Tate vs. *Security Trust Co.,* 63 N. J. Eq. 559; 52 Atl. 313;

Riley vs. *Hopkinson,* 82 N. J. Eq. 469; 88 Atl. 1077;

McMurtry vs. *Bowers,* 91 N. J. Eq. 317, 109 Atl. 361;

Reddavide vs. *Laskowitz,* 99 N. J. E. 614; 133 Atl. 719; affirmed 100 N. J. E. 588; 133 Atl. 719; 135 Atl. 920;
N. J. Discount Co. vs. *Telesca,* 101 N. J. E. 462; 139 Atl. 1.

While there can be no doubt that we have expressed the general rule in the citation just given, it is nevertheless true that a distinction is made between an assignment which is supported by valuable consideration and one which is not Appellant takes the position that an examination of the cases which were just cited, and others which have been examined but which were not cited because it was felt they were not material, will disclose that only a few of them have come before this Court for review, and in the few that have been appealed, this Honorable Court has never squarely passed upon the distinction which we are attempting to now have decided for the first time, and which we sincerely believe is clearly supported by sound reasoning, by firmly established equitable principles and by cases in this and other jurisdictions.

Before going into an argument on the distinction just referred to, it will be seen, from a reading of the opinion of the learned Vice-Chancellor, in the Court below, that he relied almost exclusively upon the case of *Tate* vs. *Security Co.,* 63 N. J. Eq. 559, as the basis for his conclusions. It is respectfully pointed out that a reading of the case just cited will disclose a most material and substantial distinction between it and the case under review, which apparently was overlooked by the learned Vice-Chancellor in the Court below.

The following quotations from the opinion of Vice-Chancellor Reed, in the case of *Tate* vs. *Security Co.* fully sustain this idea.

"The right to hold this mortgage for a

pre-existing indebtedness is rested upon an agreement, endorsed upon a note for $3,000, dated February 8th, 1898. By this endorsement, William Solomon agreed that the securities hereby pledged (that is, in 1898), together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment of any past or future obligations held by the Trust Company, and that

> 'all of my securities in their hands shall stand as one general continuing collateral security for the whole of my obligations, so that the deficiency of any one shall be made good for collaterals for the rest.'

P. 561. The general rule that an assignee of a mortgage takes subject to the equities existing in favor of a mortgagor does not apply in this case, because the equity of Tate was a secret equity. While there is some conflict between the cases (Davis vs. Cressman, 12 Dick. Ch. Rep. 619), I think the rule should be settled in this state that a bona fide assignee for value of a mortgage takes it free from all latent equities existing in favor of third parties. Vredenburgh vs. Burnet, 4 Stew. Eq. 229."

P. 563. "The next question is whether an assignee taking a mortgage for a pre-existing debt, without delivering up the evidence of such debt, but taking it merely as collateral security for its payment, holds it as purchaser for value. In my judgment he does not."

It will be seen from the above that the assignee of a mortgage in the case just cited, obviously and plainly took the assignment only as security for a pre-existing indebtedness, and not as payment of such indebtedness and that it did not in any legal respect change its position.

The principle of law which appellant is endeavoring to have this Court uphold is this:

> "An assignment of a chose in action as security for pre-existing indebtedness does not give an assignee the status of a bona fide purchaser, but that an assignment given in actual payment of a pre-existing debt, where the assignee parts with anything of value or where he surrenders a valuable right or assumes an irrevocable obligation, does create in the assignee the status of a bona fide purchaser for value."

This principle is clearly pointed out in Pomeroy's Equity, Volume 2, paragraphs 748 and 749, which read as follows:

> "Whether an antecedent debt can *ever* be a valuable consideration has been denied by able courts; but this general subject has been further complicated by the various modes in which such a debt may be dealt with—secured, discharged, postponed, and the like—and the various questions thence arising which have caused the greatest conflict of judicial opinion. In very many, and perhaps a majority of the states it is settled that the transferee of negotiable paper as security for an antecedent debt may be a bona fide holder by the law merchant; but this rule cannot be a precedent in determining the meaning of valuable consideration within the equitable doctrine of bona fide purchase.
>
> "A conveyance of real or personal property as security for an antecedent debt does not, upon principle, render the transferee a bona fide purchaser, since the creditor parts with no value, surrenders no right, and places himself in no worse legal position than before. The rule has been settled, therefore, in very many of the states, that such a transfer is not made upon a valuable consid-

> eration, within the meaning of the doctrine of bona fide purchase. In some states, on the contrary, even the securing a pre-existing debt is held to be a valuable consideration. Whether the complete satisfaction or discharge or the definite forbearance of an antecedent debt, without the surrender or cancellation of any written security by the creditor, will be a valuable consideration is a question to which the courts of different states have given conflicting answers; but the affirmative seems to be supported by the numerical weight of authority."

This same exception to the general rule, if you will call it such, is clearly referred to in the case of *DeWitt* vs. *VanSickle,* 29 N. J. Eq. at page 212:

> "Still, it must be admitted, as an undoubted principle of equity jurisprudence, that though an assignee of a mortgage takes it subject to all the defences which would exist against it if it had remained in the hands of the original mortgagee, yet, if he takes it innocently and for value, he acquires a title free from all latent equities existing in favor of third persons. *Woodruff* vs. *Depue,* 1 McCart. 168; *Shannon* vs. *Marselis,* Sax. 414; *Cornish* vs. *Bryan,* 2 Stock. 146; *Wilson* vs. *Hill,* 2 Beas. 143. * * * This brings us to the question, was he purchaser for value? He admits he paid the whole of the purchase money, except $102.62, with the notes of the assignor. The surrender of a pre-existing debt is not sufficient to give him the character he claims. The reason is, by refusing to give the security any greater virtue in his hands than it had in the hands of the original mortgagee, he is put in no worse condition than he was before he obtained it; in the language of some of the judges, he is not hurt. The mortgage in the hands of the fraudulent grantor was unquestionably void

against creditors. To give it any greater force against creditors in the hands of his assignee, it must be shown to have acquired a new virtue or equity, and this can only be imparted to it by the actual payment of money, the surrender of a valuable right, or the assumption of an irrevocable obligation. Such new equity can only arise when a third person has, by an innocent purchase of the security for value, placed himself in a position from which it is impossible to extricate him without loss; but if, by declaring the paper still infected with its original infirmity, he is left just where he was when he took it, he suffers no hurt, and the court is bound to declare it invalid."

This same principle was also referred to by Vice-Chancellor Backes in the case of *Douredoure* vs. *Humbert,* 85 N. J. Eq., at page 92 (Italics ours):

"But, the taking of a bond secured by mortgage, in settlement of an existing debt, without more, does not create the holder a purchaser for value, for the reason that in the merger the form of the debt only, and not the substance, is changed—it is the same debt—and under the settled rule a mortgage taken for a precedent debt does not constitute the mortgagee a purchaser for value. *Reeves* vs. *Evans,* 34 Atl. Rep. 477; *Martin* vs. *Bowen,* 51 N. J. Eq. 452. *If, however, by the novation, a mortgagee-creditor parts with anything of value, or changes his position for the worse, it entitles him to the status of a bona fide purchaser for value. Allaire* vs. *Hartshorne,* 21 N. J. L. 665; *Mingus* vs. *Condit,* 23 N. J. Eq. 313. It seems to me it cannot be questioned that the Humberts did both. They waived the tort and the right to proceed against the body of Lingg, for his malfeasance, and accepted his

> contract; they extended the time for the payment of the debt for two years; their forbearance was upon the payment of interest at a less than legal rate; and they barred themselves from proceeding personally against their debtor until after exhausting their remedy upon the mortgage. Comp. Stat. p. 3421; *Price* vs. *Gray,* 34 Atl. Rep. 678. The giving of further time for the payment of an existing debt, by a valid agreement, for any period however short, though it be for a day only, is a valuable consideration, and is sufficient to support a mortgage, or a conveyance, as a purchase for a valuable consideration. Jones Mort. (6th ed.) Sec. 461."

We also contend that Vice-Chancellor Pitney had this same principle in mind in the case of *Martin* vs. *Bowen,* 51 N. J. Eq. 454, when he stated (Italics ours):

> "The right in this case, by reason of its being founded upon a full consideration moving at the date of its creation, holds the highest rank among equities of that class, and its holder occupies the commanding position of a bona fide purchaser for value paid. Such an equity is superior to a similar pledge given to secure simply a prior debt, *without any extension of time or surrender of any right, for the reason that the latter pledgee parted with nothing on the strength of it.* Such superior strength and merit would also, probably, give it preference over such less meritorious equity, although the latter might be prior in time."

It will be noted that in most, if not all, of the cases, where payment of a pre-existing debt is discussed, one of the most material arguments used in the opinion is that the same debt still exists

but only in different form. The substance is not changed. It is really the same debt. For these reasons, in a great many instances, the Courts have come to the conclusion that an assignment given in payment of a pre-existing debt, does not make the assignee a holder for value.

As has been pointed out, however, in this case it was not the bond of the original debtor that was taken, nor was it secured by a mortgage on his property, but it was the bond of a third party (Mand) secured by a mortgage on Mand's property, and in addition to that, the complainant changed its position by extending the due date of its debt from April 12th, 1929 to November 16th, 1930, and also surrendered its very valuable right of mechanic's lien claim against the property of the assignor.

We therefore urge that the principle of law which we are endeavoring to have upheld, to wit:

> **"An assignment of a chose in action as security for pre-existing indebtedness does not give an assignee the status of a bona fide purchaser, but that an assignment given in actual payment of a pre-existing debt, where the assignee parts with anything of value or where he surrenders a valuable right or assumes an irrevocable obligation, does create in the assignee the status of a bona fide purchaser for value."**

is one which is correct in reasoning and supported by adequate authority and that under and by vir-

tue of this principle of law, appellant in this case, for the reasons herein stated, occupies the status of a bona fide purchaser for value and its equity was superior to that of the defendant Sokol and that its right to foreclose its mortgage should have been sustained and the action of the Court of Chancery in dismissing its bill of complaint should be reversed.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

Between GEO. F. PERRY & SONS INC., a corp. of New Jersey, *Complainant-Appellant,* *and* MAX MAND, *et als.*, *Defendants-Respondents.*	*On Bill, &c.* *On Appeal from Court of Chancery.*

BRIEF OF RESPONDENTS, MAX MAND AND SARAH MAND.

Facts.

The pertinent facts in this cause are fully and succinctly set forth in the conclusions of the Chancellor (pages 37-39, State of Case) and need no further reference.

ARGUMENT.

The Chancellor's conclusions contain citation of the authorities relied upon by these respondents in sustaining the decree of the Court of Chancery. Furthermore, the respondents rely upon the argument contained in the brief of the respondent, Sokol, so that no further reference need be made thereto.

There is however, one point which these respondents make. Complainant sought in its bill to accelerate payment of the principal prior to the due date by reason of the alleged default by these respondents in the payment of an installment of interest during the period of grace (30

days). Respondents paid neither claimant, filing a counter-claim in which they interpleaded both claimants. Respondents also sought by their counter-claim to have the Court determine that the respondents were not in default in refusing to pay the installment of interest to either claimant under the circumstances involved in this case, so that payment of the principal would not be accelerated and these respondents would not be required to pay costs and counsel fee. If the decree as to the respondent, Sokol, should be reversed, these respondents nevertheless are entitled to affirmance of the decree below for the reason that these respondents were not in default when the bill was filed and that is all that the decree below adjudicates so far as these respondents are concerned. This is not disputed in the brief or argument of the appellant.

Respondents submit that the decree below, so far as it affects the respondents, should be affirmed with costs and counsel fee to respondents.

SAMUEL H. NELSON,
Solicitor for Respondents.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between GEO. F. PERRY & SONS INC., a corporation of New Jersey, *Complainant-Appellant,* *and* MAX MAND, *et als.*, *Defendants-Respondents.*	*On Bill, &c.* *On Appeal from Court of Chancery.*

BRIEF OF RESPONDENT MICHAEL SOKOL.

Facts.

(Italics ours unless otherwise stated.)

The proceedings under review were instituted by complainant-appellant to foreclose a mortgage assigned to it by one Arthur Znahrenko on April 12, 1929. While, as appellant states in its brief, the material facts are not in dispute and are practically conceded by all parties, a better perspective of the situation may be had by a brief statement of all of the facts.

One Arthur Znahrenko, owner of a piece of property located at 175 Garfield Place, Maplewood, New Jersey, contracted to sell this property to Max Mand, one of the respondents. The contract of sale, provided for a purchase money mortgage to be executed by said Max Mand as part of the purchase price. August 24, 1928, was agreed upon as the date of closing. A few days prior to July 26, 1928, the above mentioned Znahrenko applied to respondent Sokol for a loan in the sum of $2,000.00. He offered Sokol, as

security for this loan, a mortgage on certain property located at 31 Union Place, Irvington, New Jersey. Sokol deemed insufficient the offered security and rejected the loan. Znahrenko thereupon stated to respondent Sokol that he (Znahrenko), held a contract between himself and the above named respondent Max Mand, for the sale to the latter of the Maplewood property above referred to; and that according to said contract, he was due to receive a purchase money mortgage in the sum of $2,600.00. Znahrenko offered to assign this mortgage to respondent Sokol, as additional security immediately upon his receipt of same from said Max Mand. This was satisfactory to respondent Sokol; and on July 26, 1928, an agreement was executed between said Znahrenko and respondent Sokol (Exhibit D. 1, S. C. 55), which provided for the assignment by said Znahrenko to Sokol, of the purchase money mortgage in question as additional security for the repayment of the $2,000.00 loan thus made by Sokol to Znahrenko. The mortgage on the Irvington property and the agreement to assign the mortgage in question were duly delivered to respondent Sokol, whereupon he handed Znahrenko the sum $2,000.00 in cash. The agreement by Znahrenko to assign the mortgage to be executed, was recorded in the Register's office of Essex County on July 26, 1928, in Book 200 of Assignments of Mortgages on page 272 (S. C. 20). Respondent Max Mand, the mortgagor, *had knowledge* of the agreement between Znahrenko and Sokol for the assignment of the purchase money mortgage he was to execute, *and agreed to pay the proceeds of the mortgage to respondent Sokol. Mand's knowledge of the agreement to assign is conclusive, for, he admits it in his answer and cross-bill of interpleader.* On November 16, 1928, Znahrenko deeded the Maplewood property to re-

spondent Max Mand and took back the purchase money mortgage in question.

Thereafter Znahrenko, instead of assigning this mortgage to respondent Sokol, and in fraud of the latter's rights, assigned the same to one Andrey Lapitzky. This was on February 14, 1929. It was not recorded until February 26th, *twelve days later.* Three days later, on February 19, 1929, Lapitzky re-assigned the said mortgage to Znahrenko. This re-assignment was not recorded until April 18, 1929, *eight weeks later.* It should be noted that the date of the re-assignment by Lapitzky to Znahrenko is wedged in between the date when Znahrenko first assigned the mortgage to Lapitzky and the date of its recording. It should also be noted that it is on this very April 18, 1929, that appellant recorded the mortgage Znahrenko assigned to it. In other words, although Lapitzky re-assigned the mortgage to Znahrenko on February 19th, it was kept off record until April 18, 1929, on which date the re-assignment from Lapitzky to Znahrenko was recorded; and this was the very same day the assignment was obtained by appellants, Geo. F. Perry & Sons Inc. from Znahrenko which latter assignment was also kept off the record for a period of 5 days following the making thereof. The assignment of mortgage to Lapitzky by Znahrenko was a step in his scheme to defraud respondent Sokol. The dates of assignment and re-assignment, and the failure to record the re-assignment until 2 months after Lapitzky's re-assignment to Znahrenko is significant. It was Znahrenko's design to make the record appear that Lapitzky, a third party, held this mortgage, concealing meanwhile the fact that he was then holding an unrecorded re-assignment to himself.

The assignment to appellant of the mortgage in question was based upon a pre-existing debt. There is no question about that. The following extract from the testimony demonstrates it:

> "Mr. Rosenstein: Will complainant state what the consideration was for the assignment of the mortgage given to it (appellant) by Z." (S. C. 21)?

This question was answered (S. C. 22):

> "Mr. Brams: My client supplied Arthur Znahrenko with a carload of material in the building of various houses. That the debt was past due and my client said to Mr. Znahrenko, 'We have not received payment of this money.' Mr. Znahrenko said, 'I have not got the money.' 'What have you got to give us in payment of it?' Mr. Znahrenko said, 'I have a mortgage of $2600 and I will assign this mortgage to you in payment.' That assignment and the money was credited against the account of Arthur Znahrenko."

Interest fell due on the mortgage and appellant demanded same from respondent Max Mand, who, having notice of the agreement whereby Sokol was the equitable owner of the mortgage in question, notified Sokol of appellant's demand. Respondent Sokol, communicated with appellant who told Sokol of the assignment of the mortgage to it. Both the appellant and respondent Sokol, claimed the mortgage and demanded the interest from respondent Mand. As a result of the conflicting claims of the appellant and the respondent Sokol, Max Mand paid neither. Appellant thereupon instituted foreclosure proceedings for the non-payment of interest to it to which answer and cross-bill of interpleader was filed by respondent Mand, praying in his counterclaim that this Court determine the rights of the respective parties.

CHRONOLOGY

May 14, 1928.	Contract executed between Znahrenko and Max Mand for sale of property 175 Garfield Pl. Maplewood, N. J. providing for closing on August 24, 1928.
July 26, 1928.	Agreement executed between Znahrenko and Sokol for assignment of Max Mand mortgage when executed.
November 16, 1928.	Title was closed. Max Mand obtained deed from Znahrenko and executed to latter the aforesaid purchase money mortgage.
February 14, 1929.	Znahrenko assigned above mortgage to Andrey Lapitzky. Recorded February 26, 1929.
February 19, 1929.	Lapitzky re-assigned mortgage to Znahrenko. Recorded April 18, 1929.
April 12, 1929.	Znahrenko assigned the mortgage to Geo. F. Perry & Sons Inc. the appellant. Recorded April 18, 1929.

ARGUMENT.

The assignment of the mortgage in question to appellant was based upon a pre-existing indebtedness owing from Znahrenko to appellant and is, therefore, not a valid consideration as against respondent, Michael Sokol, who was the equitable owner of said mortgage based upon a full consideration moving at the time of

the creation thereof; and is, therefore, entitled to priority. Furthermore, the original obligor (respondent Max Mand), having had notice of the equitable assignment to respondent Sokol, there was an equity against the mortgage by which appellant was bound; and that appellant had sufficient notice and was under a duty to make inquiry of the mortgagor before taking the assignment of the mortgage in question from Znahrenko, but neglected to do so.

POINT I.

An agreement to give a mortgage amounts to an equitable mortgage.

The agreement to assign to respondent Sokol, the purchase money mortgage in question, constituted a valid equitable assignment which equity will sustain, *Cogan* v. *Conover*, 61 N. J. E. 358, 60 Atl. 408, 414; and an agreement to create a mortgage, whatever its form may be, is an equitable mortgage. That rule is so fundamental and universally applied as to make unnecessary the citation of authorities. The principle is stated in *Cummings* v. *Jackson*, 55 N. J. E. 805, 810 (E. & A.), 38 Atl. 763, 765, quoting with approval from Jones on Mortgages (Fourth Ed.) Sec. 162, that

> "Whatever the form of the contract may be, if it was intended thereby to create a security, it is an equitable mortgage."

In *Martin* v. *Bowen*, 51 N. J. E. 452, 26 Atl. 823, it was held that the holder of an agreement to give a mortgage is entitled to an equitable charge upon the land in question. In deciding this case, Pitney, *V.-C.*, among other things, said:

> "* * * complainant holds what is known as a 'pure equity' in the land in question.

> This is simply a right to come into a Court of Equity and ask it to appropriate the land in question to the payment of the debt for which it was pledged. *The right in this case, by reason of its being founded upon a full consideration, moving at the date of its creation, holds the highest rank of equities of that class, and its holding holds the commanding position of a bona fide purchase for value paid.* Such an equity is superior to a similar pledge given to secure simply a prior debt, without any extension of time, or surrender of any right for the reason that the latter parted with nothing on the strength of it. Such superior strength and merit would also, probably, give it preference over such less meritorious equity, although the latter might be prior in time. It would prevail over a subsequent purchaser by contract only, without notice, although the purchase price he paid, because the equity of each would be equal, and the pledge would be prior in time; but if the subsequent purchaser, in addition to paying the price, got the legal title, he would, by its strength, prevail, but if he procured the legal title without paying the price he would not prevail. These rules are familiar and fundamental. The defendant assignee paid no consideration for his conveyance and, of course, his title, standing by itself, for that reason, cannot prevail over the complainant's equity."

The admission by appellant (S. C. 22) that the mortgage was given in payment of a past due indebtedness brings the instant case directly within the principle of the foregoing citation and the following cases:

Mingus v. *Condit*, 23 N. J. E. 313;

Pancoast v. *Duval*, 26 N. J. E. 445;

Lawshe v. *Trenton Banking Co.*, 87 N. J. E. 56, 99 Atl. 617;

Tate v. *Security Trust Co.*, 63 N. J. E. 559, 52 Atl. 313.

See also Annotations in 27 L. R. A. (N. S.) 621 and 33 L. R. A. (N. S.) 57, 58, profusely supported by the cases therein collected. *These cases hold that an equity based upon a consideration moving at the time of the creation thereof, is superior to the securing or payment of a prior or antecedent indebtedness.*

In *Mingus* v. *Condit*, 23 N. J. E. 313, the Chancellor on page 315 cites the case of *Allaire* v. *Hartshorn*, 1 Zab. 665, and says:

> "* * * The rule of equity regulating the transfer of property is that a purchaser who has obtained title as a *mere security for or payment of a pre-existing debt, without parting with anything of value, is not entitled to the character of a bona fide purchaser for value. I feel constrained to consider this as the law of this State.*"

In the case of *Pancoast* v. *Duval, et al.*, 26 N. J. E. 445, Syl. 1, reads:

> "A grantee of land by a conveyance made subsequently to a mortgage which the mortgagee had neglected to have recorded, which conveyance was claimed to have been in payment of a pre-existing debt, *held* not to have been a bona fide purchaser, nor a purchase for valuable consideration, within the meaning of the 'act to register mortgages,' so as to give him a preference over the prior unregistered mortgage."

Respondent Sokol, paid $2,000.00 in cash to Znahrenko simultaneously with his execution of the agreement to assign to respondent Sokol the mortgage in question (Exhibit D. 1, S. C. 55). To apply the law to the facts as they appear from the testimony is to dispose of the matter. **Respondent Sokol's equity being based upon a present consideration passing at the time of the execution of the agreement to assign the mortgage to him, is superior to the claim of appellant**

based upon the securing or payment of an antecedent indebtedness. It follows therefore, that the decree made by the Court of Chancery determining respondent Sokol to be the owner of the mortgage should be affirmed. Equity considered as done that which ought to have been done. Moreover, the decree makes the finding of fact that the assignment to appellant of the mortgage in question was based on a pre-existing debt in contrast to the cash consideration for the agreement to assign the mortgage to respondent Sokol.

Appellant in its brief (p. 5) confines itself to the single proposition:

> "Was the assignment of the mortgage supported by a consideration which entitled the complainant to the benefits of a bona fide holder?"

The unqualified answer is "No." The appellant was not a bona fide holder for "value," and the determination of the Court of Chancery in so deciding, should not be disturbed.

The appellant argues that everything in the record bearing on the question of consideration appears on pages 21-22, of the State of the Case. That is absolutely so. And the admission by appellant (S. C. 22) conclusively establishes the fact that the consideration for the assignment of the mortgage to appellant was the discharge or payment of a pre-existing debt.

There is absolutely nothing in the record except that the assignment to appellant was for a pre-existing debt; AND NOW, ON APPEAL, AND FOR THE FIRST TIME, APPELLANT ATTEMPTS TO INJECT THE CLAIM THAT IT SURRENDERED "THE RIGHT TO FILE A MECHANIC'S LIEN CLAIM AND RENDERED ITS POSITION WORSE, ETC." NO-

WHERE DOES ANY TESTIMONY APPEAR IN THE RECORD SHOWING THAT APPELLANT AT ANY TIME HAD OR GAVE UP ANY RIGHT TO FILE A MECHANIC'S LIEN CLAIM NOR HAS THIS QUESTION EVER BEEN RAISED IN THE COURT BELOW. IT IS ENTIRELY DEHORS THE RECORD AND ENTITLED TO NO CONSIDERATION BY THIS COURT IN THE DETERMINATION OF THIS APPEAL.

Appellant, on page 12 of its brief, quotes from Pomeroy's Equity, paragraphs 748 and 749, but stops a little too soon. The language immediately following appellant's quotations bears directly on appellant's attempt to color the transaction, for, as Prof. Pomeroy says:

> "Some legal rules ought to be settled in accordance with the results of experience and the dictates of policy, rather than by a compliance with the deductions of strict logic. *To hold that a conveyance as security for an antecedent debt is made without, but that one in satisfaction of such a debt is made with a valuable consideration, when the fact of satisfaction is not evidenced by any act of the creditor, but depends upon mere verbal testimony, is opening the door wide for the easy admission of fraud.* It leaves the rights of third persons to depend upon the *coloring given to a past transaction by the verbal testimony* of witnesses, *after the event has disclosed* to the creditor *the form and nature in which it is for his interest to picture the transaction.* A rule which renders it so easy for an interested party to defeat the rights of others is clearly impolitic. It sometimes happens that rules which are the most logically correct are the ones which most readily admit the possibility of fraud and injustice."

Why appellant did not continue to quote from the point where it stopped, is quite understand-

able. It is attempting precisely that which the foregoing warns against, *i. e.;* the coloring of a "past transaction" "* * * after the event has disclosed" to appellant "the form and nature in which it is for" its "interest to picture the transaction"; and not only that, *there is not even any verbal testimony to support the attempted coloring.*

POINT II.

The agreement to assign the mortgage although amounting in itself to an equitable assignment, was nevertheless placed on record pursuant to Sec. 44-21 of the Conveyance Act C. S. C. 1924, p. 627.

Sec. 44-21 of the Conveyance Act provides:

> "All deeds or instruments of the nature or description following, of or affecting the title to any lands, tenements or hereditaments * * * or any interest therein, may be acknowledged or proved and then recorded * * * that is to say: conveyances, releases, declarations of trust, mortgages, defeasible deeds or other conveyances in the nature of a mortgage, * * * assignments and discharges or satisfaction pieces of mortgages, * * * conveyance, assurance, acquittance or release, leases for life or any term not less than two years, or any assignment thereof absolute, or by way of mortgage or security * * * and all other instruments * * * directed by any statute to be acknowledged or proved and recorded; * * *."

It requires no citation of authority to sustain the proposition that statutes providing for the registration and recordation of instruments are statutes of notice, binding all persons upon whom there is imposed a duty of inquiry. The fact of the recording by respondent Sokol, of the agree-

ment between himself and Znahrenko was notice to appellant as a matter of law that the very assignment of mortgage it was taking, was in fact, in equity and conscience, the property of respondent Sokol.

Furthermore, irrespective of the recordation of the agreement to assign, any knowledge on appellant's part put upon it the duty of inquiry. It is a settled principle of law that knowledge of facts placing a reasonably prudent person upon inquiry, he cannot neglect to make the inquiry and then claim that he is an innocent purchaser; for, the law charges him with knowledge of whatever facts reasonable inquiry would have revealed. Pomeroy Eq. Jur. Vol. 2 (4th Ed.) Secs. 597 *et seq.*

In *Wood* v. *Carpenter,* 101 U. S. 135, Justice Swayne cited with approval the following quotation from the opinion in an English case:

> "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

In *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417, 437, Chief Justice Fuller, quoting from another case, said that a purchaser

> "has no right to shut his eyes or his ears to the inlet of information and then say that he is a bona fide purchaser without notice."

In *Hoy* v. *Bramhall,* 19 N. J. E. 563, 572, Justice Depue, speaking for the Court of Errors and Appeals, said:

> "The general doctrine is, that whatever puts a party upon an inquiry, amounts in judgment of law, to notice, provided the inquiry becomes a duty * * * and would

> lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding."

And as to knowledge of certain facts by an attorney, it was held *In re Tomkins,* 13 Fed. (2nd Series) 552 (C. C. A. 2nd Circ.) that it was sufficient to put him upon inquiry, *and the client was charged with the knowledge of what the inquiry would have revealed.*

If the attorney for the appellant mortgagee had made the inquiry which the law required him to make, he would have learned of the making and recording of the agreement between Znahrenko and respondent Sokol to assign to the latter the mortgage in question.

See also *Haslett* v. *Stephany,* 55 N. J. E. 68, 78.

POINT III.

An assignee of a mortgage is under a duty to inquire of the mortgagor whether or not there is any dispute with respect to the mortgage.

The mortgagor (who is the respondent Max Mand), had knowledge of the equity in favor of respondent Sokol. Max Mand's answer admits it, and the Court of Chancery so found. If the appellant had made any inquiry of the mortgagor, as it was in duty bound to do, the fact of the prior assignment to respondent Sokol would have been disclosed to appellant. While the assignment to respondent Sokol is prior in time and superior as to consideration as against appellant, assuming even for the sake of argument that appellant's consideration was "valuable," still, the determination of the Court of Chancery must be affirmed on the authority of *Reddavide, et ux.* v. *Laskowitz, et al.,* 99 N. J. E.

614, 133 Atl. 719, affirmed 100 N. J. E. 588, 135 Atl. 720, the circumstances of which case parallel those of the case at bar. The following quotation from *Vredenburgh* v. *Burnet*, 31 N. J. E. 229 (affirmed 34 N. J. E. 252) is quoted therein with approval as follows:

> "It is always easy for an assignee, *before purchasing, to inquire of the mortgagor*, or of those who have succeeded to his rights, whether or not its validity will be disputed * * *. *If he chose to refrain from doing so, * * * relying entirely upon the representations of his assignor, I think he has no right to ask the complainant (in this case the co-defendants) to bear the consequence of his own folly.*"

The facts in the *Reddavide, et ux.* v. *Laskowitz, et al. case, supra,* briefly stated, are as follows: The Reddavides obtained a mortgage loan from Chirelstein and Bell. The deal was arranged by one Kleinman. Chirelstein and Bell were illiterate. Kleinman fraudulently had the mortgage run to himself. He recorded it; and subsequently, for a cash consideration, assigned it to one Laskowitz. Chirelstein and Bell discovered the fraud and demanded the proceeds of the mortgage from Reddavide. Laskowitz, who held the assignment of the mortgage as aforesaid, likewise demanded the proceeds. Reddavide, the mortgagor, knew of the existing equities of Chirelstein and Bell. He refused to pay either claimant and filed a bill in the nature of an interpleader.

The Court held the equity there to be

> "one existing *against the mortgage in the hands of the original obligor, and Laskowitz is bound thereby.*",

the Court at this point citing with approval the quotation from *Putnam* v. *Clark,* 29 N. J. E. 412, aff. 33 N. J. E. 338, that

> "The purchaser for value of a chose in action is bound by the equities existing against it in the hands of the original obligor."

Moreover, the Court held, Laskowitz had sufficient notice imposing upon him the obligation to investigate; and had he done so, the fraud would have been frustrated.

> "*A simple question,*" the Court said "*would have disclosed the fact that it was not the intention of the parties to make Kleinman the mortgagee.* Five days intervened between the date of the assignment to him and its record."

In the Reddavide case the mortgagor knew of the equities of Chirelstein and Bell. A simple question directed to the mortgagor, Reddavide, would have disclosed them. In the Reddavide case, *supra,* there was an interval of five days between the execution and recording of the mortgage. *That is more than matched by the interval of eight weeks between the re-assignment from Lapitzky to Znahrenko immediately prior to the assignment to appellant.* If, in the former case, a five-day interval was deemed sufficient to excite the mortgagee's suspicion imposing upon him the duty to make inquiries, *a fortiori, the lapse of eight weeks in the instant case between the execution of the assignment coupled with the other intervals between the execution and recording of the intervening assignments prior to the assignment to appellant, imposed upon the appellant the duty of inquiry.* In the Reddavide case the mortgagor knew of the equities of Chirelstein and Bell. In the case under review the mortgagor, Max Mand, like-

wise *knew* of the equities of respondent Sokol. Just as in the Reddavide case a simple question directed to the mortgagor, Reddavide, would have disclosed the fraud, so, a simple question directed to the mortgagor, Max Mand, in the instant case, would likewise have disclosed and frustrated the fraud; and, as was held in *Vredenburg* v. *Burnet, supra*, the appellant has no right to ask that respondent Sokol,

> "bear the consequences of his (appellant's) own folly."

Furthermore, there is no question that appellant knew the history of the assignments and re-assignments and the lapses of time between execution and recordation. Mr. Brams, counsel for the appellant knew it (S. C. 34). He was asked on cross examination (S. C. 35):

> Q You drew the assignment to Perry?
> A I did.
> Q At that time *you knew that there was an unrecorded assignment made eight weeks prior thereto to Lapitzky?*
> A *Yes, sure.*
> Q *Did you say anything to Perry about that?*
> A *Yes, that is why I got the other assignment back to Z. He knew about it.*
> Q *You told Perry all about it?*
> A *Yes.*

And thus is the Tomkins case, 13 F. (2nd) 552 (C. C. A. 2nd Cir.) *supra*, directly applicable: *that knowledge of certain facts by an attorney is sufficient to put him upon inquiry; and the client was charged with the knowledge of what the inquiry would have revealed.*

Moreover (and despite the knowledge possessed by appellant and its counsel), *no inquiry* was made by either of them prior to taking the

assignment. Mr. Brams, when further examined, testified (S. C. 35-36):

> Q *Did you ever make any inquiry of Mand, the mortgagor, with respect to the mortgage?*
> A *No.*
> Q *You did nothing with respect to ascertaining any information with respect to the mortgage made by Mand?*
> A *No.*

And to rivet further the fact that no inquiry was made by appellant, reference is made to the testimony of respondent, Max Mand, the mortgagor (S. C. 33):

> Q Mr. Mand, did Perry & Son at any time make any inquiry of you before they took the assignment of the mortgage?
> A No.
> Q Did they ever communicate with you in any way at all before they took the assignment of the mortgage?
> A No.

The mortgagor, Max Mand, knew of the existence of the agreement between Znahrenko and Sokol for the assignment of the mortgage by the former to the latter. There is no question about that. It is set up in Max Mand's answer and cross-bill of interpleader. Furthermore, the testimony of Harry Mand shows that to be the fact. This last witness was asked (S. C. 27):

> Q When did you or your father first receive notice of the fact that Perry had an assignment of this mortgage?
> A That is a letter from Perry some time in July.
> Q Was that the first time you received any information concerning the assignment to Perry?
> A Yes, sir, *the first time that we knew that there was another party that had an interest in that mortgage.*

Q Did you on behalf of your father get in touch with Perry after that?

A *No, knowing that Sokol had an assignment. We always told him we would pay him the money. I gave this letter to Sokol and told him to take care of it.*

The witness, Harry Mand, testified further that Mr. Brams was present when the assignment of the mortgage was made to the appellant (S. C. 29). That Znahrenko was also present; and that Mr. Brams' attention was expressly drawn to the Sokol agreement. The record shows (S. C. 29):

"A *I was the one that called Sokol and Znahrenko together and asked Mr. Znahrenko, I said 'What are you going to do about the Sokol assignment?' So he said to me 'My lawyer will take care of it.' Mr. Brams said 'We will take care of it' and we started talking about the extras, there was a dispute about the extras, and that is all that was said about the assignment.*"

Further on the witness was asked:

Q Can you recall the exact words used by Mr. Brams at the time?

A *Yes, "we will take care of it."*

Mr. Brams, the solicitor for appellant took the stand and said (S. C. 34):

"I deny such a conversation and deny having said any such thing."

But, what are the probabilities? The witness, Harry Mand is a disinterested party. He has no financial interest in, nor is he in any way concerned with, the outcome of the dispute between Perry & Sons Inc. and Sokol. Mand testified that *Mr. Brams said "we will take care of it,"* referring to the Sokol agreement. Asked to give the exact words Mr. Brams used, *he repeated that Mr. Brams said: "we will take care of it."* Mr. Brams does not deny that he was present at the time. He denies merely the conversation. Ad-

mittedly, Mr. Brams is an interested witness. It is not too much to say that as solicitor for complainant, he was interested in the outcome. *Is the denial of a fact by an interested witness more probable or credible than the affirmation of such fact by a disinterested witness?* The question carries its own answer.

In *N. J. Discount Co.* v. *Telesca, et al.,* 101 N. J. E. 426, 139 Atl. 1, which, among other things said:

> "* * * As to equities in favor of the mortgagor, an assignee may protect himself by obtaining a declaration of no defenses; as to others he may abide by the registry."

Max Mand took title to the premises subject to the mortgage and *with knowledge of the agreement by Znahrenko to assign the same to respondent Sokol.* That is not denied or disputed. Znahrenko was the owner of the property when the agreement between him and Sokol was made. Max Mand had a contract to purchase the property. It was a purchase money mortgage that Znahrenko was to get from Max Mand, and assign to Sokol. *When Znahrenko executed the agreement to Sokol, he ipso facto invested Sokol with an equitable interest in the land* to the extent of securing the loan of $2,000.00 with full notice thereof to Max Mand. Hence, Sokol's *pro tanto* interest in the land is, to the extent of his security, superior even to Max Mand's, although the latter is now the record owner of the property. To illustrate the point, let us assume that there was a mutual rescission of the contract between Max Mand and Znahrenko. Znahrenko would then continue as owner. Unquestionably Sokol could impress a lien upon the property to the extent of $2,000.00, for the reason that Znahrenko, by his agreement, gave Sokol an equitable

interest in the land. Now, Mand having notice of Sokol's equity, he is bound to Sokol to the extent of that equity. We thus have a situation which parallels the Reddavide case, *supra,* of an "equity existing against the mortgage in the hands of the obligor" and appellant "is bound thereby."

In concluding this memorandum it is pertinent to observe that appellant is a seasoned and experienced dealer in building materials. Furthermore, it was represented by counsel; much was known to the former and the latter; and it is a safe wager, that if appellant were parting with *any present valuable consideration* for the assignment of the mortgage, it would not only have inquired, but in the parlance of current aphorism, would have "checked and double checked." Appellant having parted with nothing, it asked no questions and made no inquiries. It was looking "no gift horse in the mouth."

The decree of the Court of Chancery should be affirmed with costs.

Respectfully submitted,

GEORGE H. ROSENSTEIN,
Solicitor for and of Counsel with
Defendant Michael Sokol.